TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 171

KATHERINE LINSTEAD, EXECUTRIX OF THE ESTATE OF JOHN A. LINSTEAD, DECEASED, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 28, 1927

CERTIORARI GRANTED MARCH 14, 1927

(32,427)

(32,427)

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INDEX

	Original	Print
Record from the district court of the United States, eastern		
Kentucky	1	1
Caption (omitted in printing)	1	
Petition	1	1
Summons and sheriff's return (omitted in printing)	4	
Order filing answer	5	3
Answer	5	4
Order issuing subpœnas	7	5
Minute entries	8	6
Reply	8	7
Verdict	9	7
Order filing motion for a new trial	10	7
Motion for new trial	10	8
Judgment	11	9
Order allowing writ of error	12	9

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	Original	Print
Petition for writ of error	13	10
Assignments of error	14	11
Bond on writ of error (omitted in printing)	16	
Writ of error	17	13
Order filing original exhibits	18	14
Citation and service (omitted in printing)	18	
Bill of exceptions	19	15
Caption	19	15
Testimony of Katherine Linstead	19	15
John J. Schuler	22	19
Bernard E. Ruddick	29	26
C. E. Gregory	32	29
Herbert Jackson	37	35
William J. Neal	38	36
John S. Cox	39	38
Maurice L. Galvin	40	39
E. D. Samuels	43	42
Charge to jury	44	43
Order settling bill of exceptions	49	48
Praecipe for transcript of record	49	49
Clerk's certificate (omitted in printing)	50	
Plaintiff's Exhibit No. 1—Pay check stubs	51	49
No. 2—Statement of wages earned	53	50
No. 3—Order granting certificate of probable cause, etc.	54	51
No. 4—Time tables	55	51
Proceedings in the United States circuit court of appeals, sixth circuit	57	53
Appearance of counsel (omitted in printing)	57	
Argument and submission (omitted in printing)	57	
Judgment	57	54
Opinion per curiam	58	52
Clerk's certificate (omitted in printing)	58	
Order allowing certiorari	59	52

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

#3525

KATHERINE LINSTEAD, Executrix of the Estate of John A. Linstead, Deceased Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant

PETITION—Filed April 16, 1925

For cause of action against the defendant, the plaintiff, Katherine Linstead, Executrix of the estate of John A. Linstead, deceased, alleges as follows:

I

That she is the duly appointed, qualified and acting executrix of the estate of John A. Linstead, deceased; that she is a citizen of the State of Kentucky and a resident of Kenton County in the Eastern District of Kentucky, Kentucky; that the defendant, The Chesapeake & Ohio Railway Company, is a citizen of some foreign state, towit: as this plaintiff is informed, the State of Virginia; that the amount involved in this controversy exceeds the sum of Three Thousand ($3,000.00) Dollars exclusive of interest and costs, towit: Fifty Thousand ($50,000.00) Dollars.

[fol. 2] II

Plaintiff says that the defendant, The Chesapeake & Ohio Railroad is an interstate carrier engaged in operating a railroad and transporting passengers and freight in interstate commerce between the State of Kentucky and other states.

III

Plaintiff further says that at the time hereinafter referred to the Defendant Company and the Big Four Railroad Company had an arrangement between them whereby crews of the Big Four Railroad Company operated trains over the tracks of the defendant company under its orders and under its control and in pursuance of said arrangement John A. Linstead, now deceased, was employed by the defendant company operating trains over its tracks and under its control and engaged in interstate commerce.

IV

Plaintiff further says that on the 15th day of August, 1923, at about 2:30 A. M., while the said John A. Linstead, now deceased, was employed by the defendant company as a freight conductor and engaged in interstate commerce, he was riding in a caboose of a freight train which had left Stephens, Kentucky and was proceeding toward Cincinnati, Ohio, at a speed of about twelve or fifteen miles per hour; that said train on which John A. Linstead was riding was overtaken and run into by one of the defendant's commuter trains known as the "Chippy" and the caboose in which the said John A. Linstead was riding was completely demolished by the impact and the said John A. Linstead received grievous and mortal injuries which caused his death.

V

Plaintiff further says that said collision was caused without any carelessness or negligence on the part of the said John A. Linstead but wholly through the negligence of the defendant, its agents and servants in running said commuter train at an excessive and high rate of speed and in not keeping a proper lookout for other trains and in passing a caution signal and stop signal on the block system without paying any attention to said signals and [fol. 3] in not stopping said commuter train before running into the rear of said freight train.

VI

Plaintiff further says that at the time of the death of plaintiff's decedent, John A. Linstead, he was a married man in robust health, forty-seven (47) years of age, resid

ing at 2317 Warren St., C[illegible]ington, Kentucky, and was earning approximately Twenty eight Hundred ($2,800.00) dollars per year.

VII

Plaintiff further says that at the time of the death of the said John A. Linstead, plaintiff's decedent, he left surviving him his widow, Katherine Linstead, age forty four (44) years and two children, John William Linstead, age seventeen (17) years and Charles Linstead, age twelve (12) years, who were wholly dependent upon him for support and reside at 2317 Warren Street, Covington, Kentucky. This suit is brought for their benefit and under the Federal Employers Liability Act of 1908 and as subsequently amended.

VIII

Plaintiff further says that as a direct result, of this collision and the death of John A. Linstead, she as the wife of John A. Linstead, deceased, and the children aforesaid, have been damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Wherefore, plaintiff prays for judgment against the defendant, The Chesapeake & Ohio Railroad Company for the sum of Fifty Thousand ($50,000.00) dollars together with cost of this suit.

John W. Cowell, Attorney for Plaintiff.

Duly sworn to by Katherine Linstead — Jurat omitted in printing.

[fol. 4] Summons and sheriff's return filed April 18, 1925, omitted in printing.

[fol. 5] In United States District Court

Order — Filing Answer Filed October 19, 1925

This day came the defendant by counsel and offers for filing its answer herein, and the court being advised it is ordered that said answer be, and same is now filed and noted of record.

A. M. J. Cochran, Judge.

In United States District Court

Answer—Filed October 19, 1925

The defendant, The Chesapeake & Ohio Railway Company for answer herein says that it was not sufficient knowledge or information upon which to form a belief that plaintiff is the duly appointed and qualified and acting executrix of the estate of John A. Linstead, deceased; or that she is a citizen of the State of Kentucky and a resident of Kenton County in the Eastern District of Kentucky.

Plaintiff denies that at the time referred to in the petition, it and the Big Four Railway Company had an arrangement between them whereby crews of the Big Four Railway Company operated trains over the tracks of the defendant company under its orders and under its control; denies that in pursuance of said or any arrangement John A. Linstead was employed by defendant company operating trains over its tracks or under its control; denies that on the 15th day of August, 1924, at about 3:50 o'clock A. M. or at any other time while the said John A. Linstead, now deceased, was employed by the defendant company as a freight conductor and engaged in interstate commerce, he was riding in the caboose of a freight train which had left Stevens, Ky., and was proceeding towards Cincinnati, Ohio, at a speed of about 12 or 15 miles an hour; denies that said train on which said John A. Linstead was riding was overtaken and run into by one of the defendant's commuter trains known as the "Chippie," and the caboose in which the said John A. Linstead was riding was completely de- [fol. 6] molished by the impact, and denies that said John A. Linstead in said manner received injuries which caused his death; denies that said collision was caused without any carelessness on negligence on the part of said John A. Linstead; denies that it was due wholly or at all, to the negligence of the defendant, its agents or servants in running said commuter train at an excessive or any rate of speed, or in not keeping a proper lookout for other trains, or in passing a caution signal or stop signal on the block system without paying any attention to said signal, or in not stopping said commuter train before running into the rear of said freight train.

Defendant says it has not sufficient knowledge or information to form a belief that at the time John A. Linstead died he was a married man in robust health, 47 years of age, residing at 2317 Warren Street, and earning $2800.00 per year. Defendant says that it has not sufficient knowledge or information to form a belief that at the time of the death of said John A. Linstead he left surviving his widow, Katherine Linstead, aged 44 years, or two children, John Wm. Linstead, aged 17 years, or Chas. Linstead, aged 12 years, or that said wife or children were wholly, or at all, dependent upon said decedent for support.

Defendant denies that as a direct result of the collision described in the petition, the death of John A. Linstead resulted, or that the wife of John A. Linstead, or his children have been damaged in the sum of $50,000, or in any other sum of money whatsoever.

2. Defendant further answering says that if plaintiff's decedent was injured or killed as complained of in the petition herein, such injuries were received and his death resulted by and through his own negligence contributing thereto, and but for such negligence upon the part of the plaintiff, said accident and injuries and death would not have been sustained.

Wherefore defendant having fully answered, prays to be dismissed herefrom with its cost.

Galvin & Tracy, Attorneys for Defendant

[fol. 7] *Duly sworn to by Maurice L. Galvin. Jurat omitted in printing.*

In United States District Court

Order Issuing Subpoena Duces Tecum—Filed November 2, 1925

On motion of John W. Cowell, Attorney for plaintiff, it is now ordered that subpoena duces tecum do issue for W. S. Taylor, Supt. of C. & O. 1866 Scott St., Covington, Ky., commanding him to appear November 4th, 1925, and bring with him all records pertaining to movements of trains between Silver Grove, Ky. and Cincinnati, O., from the evening of August 14th to the morning of August 15th,

1924, and also all records or agreements or copy of agreement existing between the C. & O. Railroad and The Cleveland, Chicago, Cincinnati and St. Louis Railway Company pertaining to any working agreement between said roads of by trains crews of the Big 4 to move trains between Cincinnati and Silver Grove, Kentucky.

Frank Kenney, Pay Master Big 4, 947 Grand Avenue, Cincinnati, O., commanding him to appear Nov. 4, 1925, and bring with him records, documents and data showing the wages received by John A. Linstead for the year prior to August 15, 1925.

C. S. Millars, General Manager, Big 4, 408 Big 4 office Bldg., Cincinnati, O. Residence Indian Hill, Cin., O. commanding him to appear Nov. 4th, 1925, and to bring with him all records or written agreements pertaining to Big 4 Ry. trains moving on the C. & O. tracks in Kentucky.

November 2, 1925.

A. M. J. Cochran, Judge.

[fol. 8] In United States District Court

Minute Entries—November 4, 1925

This day came the plaintiff by counsel and offered for filing reply herein and the court being advised it is ordered that said reply be and the same is now filed and noted of record.

Whereupon this cause coming on for trial both parties having announced ready the court directed the Marshal to place a jury in the box, and the Marshal placed in the box the following named Jurors, viz: J. L. Cassidy; C. C. Arrowsmith; H. S. Howe; Joe Riley; John Kendall; S. C. Tilton; Charles A. Wood; E. L. Hendrick; L. T. Jett; G. C. Barlow; A. I. Baird; and R. C. Yelton all of whom were elected, tried and sworn, well and truly to try the issue joined and a true verdict make. The witnesses were called to the bar of the Court and there duly sworn by the Clerk.

The jury heard a portion of the evidence and the usual hour for adjournment having arrived the court admonished the jury, and dismissed them from the consideration of this cause until November 5th, 1925 at 9 A. M.

A. M. J. Cochran, Judge.

In United States District Court

Reply—Filed November 4, 1925

Plaintiff for reply to defendant's answer herein, denies that the injuries suffered by John A. Linstead were received by or through his own negligence contributing thereto, denies that but for any contributory negligence upon the part of plaintiff's decedent, John A. Linstead, said accident would not have happened or the injuries or death of said John A. Linstead would not have occurred.

Wherefore, plaintiff prays as in her original petition.

John W. Cowell, Attorney for Plaintiff.

[fol. 9] *Duly sworn to by Katherine Linstead. Jurat omitted in printing.*

In United States District Court

Verdict—November 5, 1925

This day this cause coming on for further trial, came the parties, plaintiff and defendant, came also the jury heretofore impaneled and sworn herein. The jury heard all the evidence argument of counsel and were instructed by the court upon the law of the case and retired to consider the matter before them. After due deliberation the jury returned into court and by their foreman announced that they did agree upon a verdict, and said verdict being read by the Clerk was and is in words and figures as follows viz:

"We the jury do agree and find for the plaintiff the sum of $16,500.00.

Joe Riley, Foreman."

[fol. 10] In United States District Court

Order Filing Motion for New Trial—November 6, 1925

This day came the defendant by counsel in open court and offered for filing motion and ground for new trial and the court being fully advised and orders that said motion and

grounds for new trial be and the same is filed and noted of record.

A. M. J. Cochran, Judge.

In United States District Court

Motion for New Trial.—Filed November 6, 1925

Now comes the defendant, The Chesapeake & Ohio Railway Company and moves the court to set aside the verdict and judgment herein and to grant it a new trial for the following reasons.

1st. Because the verdict is excessive and appears to have been rendered under the influence of prejudice and passion.

2nd. Because the verdict and judgment are against the evidence and not sustained by sufficient evidence.

3rd. Because the verdict and judgment are contrary to law.

4th. For error of the court in overruling defendant's motion made at the end of plaintiff's testimony to instruct the jury to find a verdict peremptorily for defendant, to the overruling of which motion the defendant then and there objected and excepted.

5th. For error of the court in overruling defendant's motion at the end of the whole case to instruct the jury to find a verdict peremptorily for defendant, to the overruling of which motion the defendant then and there objected and excepted.

6th. For error of that court in instructing the jury that plaintiff's decedent was an employe of the defendant, The Chesapeake & Ohio Railway Company, and was at the time of the collision performing work for the Chesapeake & Ohio [fol. 11] Railway Company, and was at the time engaged by the defendant in interstate commerce, to which instruction and that part of the instruction the defendant called the court's attention in the presence of the jury at the conclusion of the instruction and then and there excepted to said instruction.

7th. For error of the court in instructing the jury that it was the duty of The Chesapeake & Ohio Railway Company to deliver the cars in question or involved in the case to the Big Four Railroad at Cincinnati, Ohio, to which instruction and that part of the instruction the defendant called the court's attention in the presence of the jury at the conclusion of the instruction and then and there excepted to said instruction.

8th. For other errors apparent upon the face of the record.

Galvin & Tracy, Attorneys for Defendant.

In United States District Court

Judgment—Filed December 18, 1925

This cause coming on to be heard upon the motion and grounds for new trial heretofore filed herein; the court being advised overrules said motion, to which defendant, by counsel objects and excepts.

It is thereupon ordered by the court that the plaintiff, Katherine Linstead, executrix of the estate of John A. Linstead, deceased, recover of the defendant, The Chesapeake and Ohio Railway Company, a corporation, the sum of ($16,500) Sixteen thousand five hundred dollars.

A. M. J. Cochran, Judge.

[fol. 12] In United States District Court

Order Allowing Writ of Error—Filed February 11, 1926

This 11th day of February, 1926, came the defendant, The Chesapeake & Ohio Railway Company, by its attorneys and filed herein and presented to the court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenti-

cated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by said United States Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon said defendant giving bond and filing same with the clerk of this court according to law in the sum of $20,000 to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fail to make its plea good, then the said obligation to be void, otherwise to remain in full force and virtue, said bond to be approved by this court, which said bond shall operate as a supersedeas, and all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky.

[fol. 13] In United States District Court

Petition for Writ of Error—Filed February 11, 1926

To the Hon. A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky:

Now comes The Chesapeake & Ohio Railway Company, defendant herein, by its attorneys, and respectfully shows that on the 4th day of November, 1925, the jury duly impaneled, found a verdict against your petitioner and in favor of the plaintiff, and upon said verdict a judgment was entered by this court in favor of said plaintiff on the 18th day of December, 1925, against your petitioner, the defendant herein, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully in detail appear from the assignment of errors which is filed with this petition.

Your petitioner feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided for the correction of errors so complained of and herewith assigned, and that a transcript of the record, proceedings and papers in this case, duly authenticated may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount of security to be given by your petitioner, the defendant herein, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

Galvin & Tracy, Attorneys for Petitioner in Error.

[fol. 14] In United States District Court

Assignments of Error—Filed February 11, 1926

Now comes The Chesapeake & Ohio Railway Company, defendant in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause assigns the following errors which defendant avers occurred in the trial thereof and upon which it relies to reverse the judgment entered therein as appears of record:

1. That the court erred in overruling the motion made by the defendant immediately at the close of all the evidence offered and introduced by the plaintiff on the trial of said cause and after plaintiff had rested, to direct a verdict in favor of the defendant, for the reasons set forth in the motion, to wit:

(a) That the plaintiff's decedent was not at the time of his death employed by the defendant, The Chesapeake and Ohio Railway Company.

(b) And that he was not entitled to recover under the provisions of The Federal Employers Liability Act.

(c) That the action was prosecuted under the Federal Employers Liability Act and that plaintiff's decedent was not entitled to recover thereunder, and that the act was not applicable to him and did not cover the case,—

to which action and ruling of the court in overruling said motion to direct a verdict for the defendant, defendant at the time excepted.

2. That the court erred in overruling the motion made by the defendant immediately at the close of all the evidence offered and introduced in the case, and after the plaintiff and defendant had rested, renewing the motion made at the close of plaintiff's evidence in chief, to direct a verdict for the defendant for the reasons set forth in said motion, to wit:

(a) That the plaintiff's decedent was not at the time of his death employed by the defendant, The Chesapeake & Ohio Railway Company.

(b) And that he was not entitled to recover under the provisions of The Federal Employers Liability Act.

(c) That the action was prosecuted under the Federal Employers Liability Act and that plaintiff's decedent was not entitled to recover thereunder and that the act was not applicable to him and did not cover the case,—

to which action and ruling of the court in overruling said motion to direct a verdict for the defendant, defendant at the time excepted.

(fol. 15) 3. That the court erred in using the following language in the general charge which it delivered to the jury, to wit:

"Under the evidence you would be authorized to find, you couldn't find otherwise, that the decedent, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work. That is made out in this way. He was a regular employee of the Big Four Railroad Company, not a regular employe of The Chesapeake & Ohio Railway Company. But at the time of the collision, what he was doing was performing work for The Chesapeake

& Ohio Railway and not the work for the Big Four Railroad. He was performing that work under the supervision, direction and control of the Chesapeake & Ohio Railway Company. The Big Four Railroad employed him and alone had a right to discharge him, and paid him wages, but at the time of the collision, by reason of the fact that he was doing the work of The Chesapeake & Ohio Railway Company, and under the general supervision, direction and control of The Chesapeake & Ohio Railway, that made him for the time being, whilst so engaged, the employee of the Chesapeake & Ohio Railway Company. It was the duty of the Chesapeake & Ohio to deliver this freight to the Big Four at the Big Four Railroad."

The error of the court in so instructing the jury in its general charge, was called to the attention of the court at the conclusion of the charge in the presence of the jury and an exception taken thereto.

4. The court erred in each and every particular of its general charge in this, to wit, that the court should have withdrawn the issues from the jury and directed a verdict for the defendant.

5. The court erred in entering judgment in favor of the plaintiff and against the defendant.

Wherefore defendant prays that the judgment of the United States Court be reversed and that said District Court be directed to grant a new trial of said cause.

Galvin & Tracy, Attorneys for Defendant.

[fol. 16] Bond on writ of error for $20,000, approved and filed February 11, 1926, omitted in printing.

[fol. 17] In United States District Court

Writ of Error. Filed February 11, 1926

To the Honorable Judge of the District Court of the United States for the Eastern District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said

District Court before you, or some of you, between Catherine Linstead, executrix of the estate of John A. Linstead, deceased, plaintiff, and The Chesapeake & Ohio Railway Company, defendant, a manifest error hath happened to the great damage of the said The Chesapeake & Ohio Railway Company, defendant, as by its complaint appears, we being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in the State of Ohio, where said Court is sitting within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 11 day of Feby. A. D. 1926.

Allowed by

A. M. J. Cochran, United States District Judge.

Attest: J. W. Menzies, Clerk of the District Court of the United States for the Eastern District of Kentucky. J. O. Hosken, D. C.

[fol. 18] In United States District Court

Order Filing Original Exhibits—Filed February 11, 1926

For good cause shown, the court being advised, it is now ordered that the original exhibits filed in this case and marked Exhibits 1-2-3 & 4 be filed with the record in this case in the Circuit Court of Appeals for the Sixth Circuit at Cincinnati, O.

A. M. J. Cochran, Judge.

Citation, in usual form showing service on John W. Cowell, filed February 23, 1926, omitted in printing.

[fol. 19] In United States District Court

Bill of Exceptions—Filed February 11, 1926

Caption

At Covington, Kentucky, on Wednesday, November 4, 1925, on the trial of the above styled proceeding, a jury having been duly empaneled, selected and sworn, after statement by counsel, the following evidence was introduced:

Appearances: For the plaintiff: John W. Cowell; for the defendant: Maurice L. Galvin and Frank M. Tracy.

Katherine Linstead

Direct examination by Mr. Cowell:

My name is Katherine Linstead, and I live at 2317 Warren Street, in Covington, Ky., I lived there about nineteen years. My husband was John A. Linstead. He was a railroad freight conductor. Sometimes he switched in the yards as a switch foreman. He died on August 15, 1924. We were married on November 29, twenty years ago, and have two boys, John Linstead, seventeen years old at the time of his father's death and Charles was twelve. Mr. Linstead was forty-seven years old at the time of his death and I was forty-four. Previous to his death, his health had been fine and he had never been at any time during our married life under the care of a physician. He was about five feet eleven inches tall in his stocking feet and weighed around a hundred and seventy-five or a hundred and eighty pounds. He had good habits, was a good home man and he would do anything around the house that a husband should do to help out at. He certainly idolized his two boys, and gave them everything he could possibly furnish to them. He would take them out, and go to shows with them. Mr. Linstead was a man that kept a little money

for himself out of his salary. He paid his railroad dues, and his brotherhood dues, and bought his own shoes and had a little spending money, but he always supported me and the children and kept the house going nicely, and he saved a little on the outside of that. He brought his pay slip and ticket home, I saw every one of them, know what he made every week. When he would draw pay, $143.48, he would give me about $125.00, that would be every two week, when he drew pay like that Mr. Linstead was em- [fol. 20] ployed by The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as the Big Four and was paid for his services by that railway company, and plaintiff introduces in evidence pay check stubs, and same are marked plaintiff's exhibit No. 1 and attached hereto.

It is agreed that during the last year of Linstead's life he earned twenty-eight hundred dollars, and the following is a statement of the amounts earned by Linstead from August 15, 1923, to August 15, 1924, which is in words and figures as follows, towit:

"Cincinnati, Ohio, April 13, 1925.

Statement of Wages Earned by John A. Linstead, Employed as a Freight Conductor by the C., C., C. & St. L. Ry. Co. from August 15, 1923, to August 15, 1924

August 15th to 31st, 1923	$94 80
Sept. 1st to 15th	95 69
Sept. 15th to 30th	94 80
October 1st to 15th	100 13
Oct. 15th to 31st	101 81
November 1st to 15th	95 99
November 15th to 30th	77 03
December 1st to 15th	82 46
December 15th to 31st	82 46
January 1st to 15th, 1924	101 32
January 15th to 31st	102 31
February 1st to 15th	101 46
February 15th to 29th	95 45
March 1st to 15th	99 91
March 15th to 31st	177 30
April 1st to 15th	158 84
April 15th to 30th	139 12

May 1st to 15th	122 84
May 15th to 31st	119 41
June 1st to 15th	143 48
June 15th to 30th	161 65
July 1st to 15th	156 25
July 15th to 31st	180 32
August 1st to 15th	156 54
	$2,841 37

(Signed) H. L. Berg, Auditor of Disbursements."

[fol. 21] Mr. Galvin: It is stipulated between the parties that during the last year of Mr. Linstead's life, he earned $2,800.00, as shown by the paper signed by H. L. Berg, Auditor of Disbursements of the C. C. C. & St. L. Ry. Co., dated April 13th, 1925. Plaintiff offers Big Four statement of wages earned by Linstead marked exhibit No. 2.

Out of the twenty-eight hundred dollars that my husband earned during the last year of his life, he would keep out of his pay, for his own use, about twenty or twenty-five dollars each pay day, about fifty dollars a month, but he would buy his shoes and all of his working clothes out of that.

Q. Out of the money that he kept, that $50.00 a month, would he spend any of that on the boys, taking them out?

Defendant objects. Objection overruled. Exception.

A. He would buy them things, bring them things home, and buy things for me occasionally, and he provided some things that he thought I would like. He used it for spending money and paid his dues out of that too. I was notified of Mr. Linstead's death on August 15th, 1924, a little after six o'clock, Eastern time.

It is admitted by defendant that Katherine Linstead was duly appointed administratrix of her husband and duly qualified.

Cross-examination by Mr. Galvin:

Mr. Linstead kept approximately fifty dollars a month for his own use and he turned the rest over to me to run

and maintain the house. He lived at home and participated and got part of whatever I provided out of the money he earned. He gave me all his wages except what he kept out. I used the money that he gave me to provide for the family and the home. I ran the home for myself, Mr. Linstead and the two boys out of what Mr. Linstead gave me.

Redirect examination:

Mr. Linstead's sight and hearing were all right. He passed the examination. Of course they had to go to be examined. He had good eyesight and his hearing was fine.

Recross-examination:

I haven't figured up what Mr. Linstead earned the year preceding, or two years before his death. Mr. Linstead [fol. 22] kept last year's slips so that he could make out his income taxes by those slips. I couldn't say what he earned the year before, because I haven't the slips to count that up.

Q. Mrs. Linstead, isn't it true that, beginning in the Spring of 1924, Mr. Linstead had received an increase in his pay and from that time up until the time of his death his earnings were very much bigger than they had been previous to that time?

Mr. Cowell: We object, it doesn't make any difference what he had been earning five or ten years ago.

The Court: Undoubtedly so. It might be helpful for you to show that his wages were increased; I don't know, go ahead. Had he been earning as much in the past as he was earning at that time?

(To which the plaintiff, by counsel, excepts.)

A. He had been. Of course, he might have made a hundred dollars or more in the last year, because of this cut he was on. He had a chance of keeping it and a chance of making more this year than he made last.

Q. Mrs. Linstead, I am going to show you a paper and will ask you just to tell the jury what that paper is?

Offering plaintiff's exhibit No. 3.

Mr. Galvin: We will limit that that may go in, we will admit that she was duly appointed administratrix of her husband and duly qualified.

JOHN J. SCHULER

Direct examination by Mr. Cowell:

My name is John J. Schuler and I live at 1528 Beech Avenue Price Hill, Cincinnati, Ohio. I have lived there about two years. I am a switchman for the Big Four Railroad Company, yard brakeman. I was acquainted with John A. Linstead and at the time of his death I was in the caboose, on our train. We were coming from Stevens to Cincinnati, bound for Riverside, Ohio, and the Big Four Terminal, there was about forty cars, moving at the maximum rate of speed we were allowed to move at. I was the rear man on the job; the crew consisted of the engineer, fireman, head man and rear man and the conductor, and conductor Linstead and myself were riding in [fol. 23] the caboose. The territory that we were in was between the Brick House and Dayton, Kentucky. We were on the westbound main line—there's two main lines there—moving with the terms of traffic specified by the special instructions or time table in the yard limits. We were moving between ten and fifteen miles an hour, going west. There was no one in the caboose besides Mr. Linstead and myself. We left Stevens, Kentucky, speaking by railroad time, around about three-thirty or three-twenty-two, in the morning. The caboose we were riding in displayed the usual tail lights—two red lights. When we were ready to leave Stevens, Kentucky, the way we railroad, the conductor gives the engineer a signal, that is an O. K. to go, or tells him verbally, and we will back up in the yard and the engineer usually whistles off, that's the signal that he is ready to leave, and the switch tender at the west end of Stevens, Kentucky, gives him a "high Ball" as we call it, or the yardmaster that it is all right for him to go. My superior officer was my conductor, Mr. Linstead. The superior of our crew over Linstead was the yardmaster at Stevens, Kentucky. He would direct the movement of our

train out of the yard and we were working under his orders. We weren't furnished with a C. & O. time table, you had to ask for it to get it. As a general rule, you are supposed to furnish yourself with them, whenever they put out these time tables. Then there are bulletins issued on certain dates or new time tables, and it is up to you to procure yourself a copy. When our crew went over into Kentucky to move cars, while we were over on the C. & O. we worked under the C. & O. yardmaster. To direct the movement of our train signal or verbal orders were given us. Once in a while you would get a written order, but on this particular night we didn't leave under written order. At the time John Linstead was killed, we had a C. & O. time table showing the movements of their trains. The train that ran into the rear end of our freight train is called the Chippy. It has no designated number that I know of. This train was not shown on the time table. I believe I have the time table that I had at the time of the accident, pretty well worn. This shows where the yard limits were over there on the C. & O. The yard limits between Covington and Cincinnati, you might say to C. S. Cabin, we run beyond Stevens,—a point east of Stevens are the yard limits. It is shown on this time table in two different places. Rule C is the special instruction, "Russell, Maysville, Stevens and Covington designated by yard limit board,"—here it is. "Cincinnati, to C. S. Cabin, to {fol. 24} Cincinnati" is all marked yard limit. By yard limit I mean is the place that you make up and break up trains, where the movement of engines is allowed without train order or time table, subject to specific instructions and rules of the special instructions. Our rules are different where you are running a through train through yard limits and when out of yard limits. The yard limit rules are that we can move trains—we are supposed to protect against first and second class trains and all other trains will move within yard limits and watch out for themselves, that is, to look for the main line to be occupied. Under the rules, within the yard limits, we have to protect against practically all trains, any class. When we are running, we protect against first and second class trains. This Chippy was not shown on this time table as one of the trains we had to protect against. The block system on the

C. & O. road within yard limits is an automatic electric block system, that is on the route we use there between Stevens and Cincinnati,—I don't know how much further it runs out. You approach the blocks, and if the block is green, it means it is a clear block, you can run your regular rate of speed, your maximum rate of speed; if the block is yellow, it indicates caution, the engineer will proceed with caution, expecting to find the next block red, and if it is a red block, he is supposed to stop and proceed with caution, not any faster than within the scope of his eye, expecting to find a broken rail or the track occupied. I couldn't exactly say how far past the last block we were at the time of the collision. Coal Haven was the last block we had passed. At the time of the accident I couldn't tell exactly our position on account of being dazed in the accident. We were possibly a block and a half beyond the block at Brick House. I am not certain whether we passed the next block beyond the Brick House, or were just by it, but we were near it. The weather that morning was foggy to some extent in certain spots, but the best condition I can give you of the fog, when we left Stevens, the engineer was pulling to the west, I saw from the rear end all forty cars when we coupled on the caboose, and when we came out of the wreck, I was pretty well dazed, able to stand up, I could see at least twelve to fifteen car lengths. I worked with Mr. Linstead on this last job about three months, off and on. I worked with him in the last twelve years off and on when I was working for the Big Four Railway. I would say I worked with him about two years all told. Immediately before the accident Mr. Linstead [fol. 25] was sitting in the caboose on the river side, opposite me. The last I remember of him, he was writing down his delays, I think. I did not see him right after the wreck. I saw him at Spears Hospital. I couldn't say whether he was killed instantly or died shortly thereafter. I only know what I was told. The cars we were hauling were what we call the west bound going to Riverside, but the final destination wasn't necessary for us, only that we were pulling to Riverside or over to the Big Four Railroad. We transfer from the C. & O. to the Big Four at what we call Wood Street, Baymiller, practically at what they call the C. U. D. Central Union Depot tracks, that's where we

enter under the Big Four. At the time of the wreck there were some barges burning right down off the river and there was some sort of smoke coming up. I don't know how far that was from the signal block. What I have seen of the smoke, it wouldn't necessarily block any signal lights, as far as that is concerned. It was the sort of smoke that wasn't real heavy, it come up sort of light, you might say, like a little fog.

Plaintiff offers time-table, marked Exhibit No. 4.

Cross-examination by Mr. Galvin:

There are four stations between Stevens and Dayton—Brent, Altamount, Newport Water Works, Brick House and Cold Haven. The lights on the block signal that I have described are on a mast that stands there, which is between fifteen and twenty feet tall. I would judge. The lights were fifteen or twenty feet above the level of the rails. The lights are located, as a general rule, on the right side of the track, and they are so located on the C. & O. They were on the right hand side the way we were going. The engineer in the engine sits on the right hand side unless the engine happens to be backing up. Then he would be on the other side. That night, our engine was headed west, which put the engineer on the right hand side. The signals on the east bound track, going in the opposite direction, are of the same type and character. They work automatically. When the train gets on a certain part of the track, the signal indicates the condition of the rail. On the C. & O. Rails over there, when there is no train on them, I believe normal condition is green, clear. There are blocks along there between Stevens and Covington. The first signal is at Brent—the next one at Altamont the next one at Newport Waterworks, the next one at what is called the Brick House and then just east of Cold Haven and one just a little bit west of Cold Haven, about [fol. 26] the graveyard up there. The graveyard is between Cold Haven and Dayton. I would judge the graveyard to be about a half mile from the Cold Haven Station, that is west of Cold Haven. This accident happened about a half mile or more of the graveyard. That would put us back almost to the signal at Cold Haven. I don't know

exactly about the signa's there. I won't be positive on account of being dazed. I don't know just exactly where the signals were located at the time of the accident, it could have happened within two hundred feet or nearer. I am not able to tell exactly where the accident happened. The burning barges were practically right close to the Cold Haven station. I saw them when we went out. We went out with just the engine and caboose and I noticed them at that time, and when we came back I noticed them burning, but I didn't notice the exact condition, but it was right close to Cold Haven. These barges were in the Ohio River. The C. & O. Railroad westward to Dayton parallels the Ohio River. The Ohio River between those two points is distant from the rails of the C. & O. at Cold Haven, where this accident happened, it is practically right down the bank. In other places the rails are as high as possibly a couple of city squares from it. On our eastbound trip I saw the barges burning and the smoke was coming up, sort of vapor like smoke. In some places it blew over the track, you know how smoke naturally will blow in different directions. That smoke came up from the track about a hundred feet or so. On the eastbound trip there might have been a little mist, but nothing to amount to anything. Coming back, it may have been a bit heavier, but not to amount to very much. In certain places it would be foggy, run along a space and it would be clear, you could see possibly a hundred car lengths from it. I had no occasion to come out of the caboose while it was moving, but I am able to tell how far I could see, because I went to see whether my marker was burning between those places, we have to keep them burning. Those lights are lanterns with a red globe in them that we have hanging on the rear of the caboose that we call marker lights, and it is up to the rear man to keep them burning. The red lights at the end of the caboose are what we call marker lights. I looked possibly three or four times to see if my red lights were burning, on that trip, I don't recall exactly how many times. Right before the accident we passed under the Brick House and I got up and looked at the red light and set down and fixed the stove door. The door of the stove wouldn't keep closed. We had a fire in the stove. It was [fol. 27] a chilly morning on the 15th of August. The

Chippy was not scheduled on the time table. It was used to carry employes backward and forward from Stevens to Covington. I knew of the operation of the Chippy. I never saw the rule schedule of the actual time of the leaving of the Chippy, but I knew that they operated every few hours. But when we were ready to leave Stevens, and the yardmaster gave us the signal to go, it was up to us to go. When you are around in the yards at any time, you don't know whether the Chippy has left ahead of you, or whether you are behind the Chippy. We left about 3:22 and the accident must have occurred a little bit before four o'clock, because time they got back to the caboose and I looked at my watch it was four o'clock, that is speaking by railroad time. The conductor gives the engineer a signal to proceed when we are ready to leave, but he doesn't give the signal to move out of the yard, he gets a signal from the switch tender. I was employed by the Big Four and was paid by the Big Four and no one had a right to discharge me except the Big Four railroad. Any passenger train or any train carrying passengers is not always considered a first class train. It sometimes happens that passenger trains are considered third class. I don't recall any right off hand, but they have been known. According to our schedule, first and second class trains are always designated on the schedule as first and second class trains. I knew at the time that the Chippy moved every two hours, between Stevens and Covington and I knew that it carried passengers. In order to protect the rear end of my train against the coming of the Chippy, as far as possible for me to do I kept my red lights burning as we were moving. In case we stopped, I was ready to go out and flag to protect my rear end, according to rule 99. Rule 99 requires you to protect your train on the main line whenever you stop. We were on the main line, and we were moving. Our trains did not make any stop from the time we left Stevens up until the time of the accident. Between Stevens and the point of the accident, the engineer slackened speed as we started up the hill. Before we started up the hill we were going possibly about fifteen miles an hour, and cut down possibly between ten and fifteen. That hill begins at a point near the Newport Waterworks and ascends as you proceed westward and ends

about the graveyard. The graveyard is the summit of the hill.

[fol. 28] Examination by the Court:

My crew was made up of conductor, engineer and two brakemen, one besides me. I was in the employ generally of the Big Four Railroad. On this night, we left the Big Four yards with an engine and tender and a caboose and went up to Stevens to get a cut of cars for Riverside, for the Big Four west line, that is a cut of cars from the C. & O. Railroad to take them to Riverside. We took them over to the Big Four Railroad and had in the neighborhood of forty cars, mostly loaded. There were about twenty-two loads and eighteen empties, somewheres around there. When we got them, we took them through the C. & O. Yards to Stevens and Cincinnati and on to the Big Four Railroad. We were operating on the Chesapeake and Ohio Railroad at the time. When you got on the Chesepeake and Ohio Railroad, generally you operate under the C. & O. Rules and regulations—you were under the instructions of their yardmaster. The Big Four Railroad haven't anything to do with our operating while running on the C. & O. tracks. They would instruct you before you left, but of course if the C. & O. yardmaster wanted to tell you different, you had to do what the C. & O. told you, or you might get in a jam. After we got this cut of cars and was ready to go to Cincinnati and to the Big Four with it, after we drew the order and saw that we had the way all right, the conductor signed and signalled to the engineer that he was ready. Sometimes he will give signals and sometimes he will tell them verbally, and you will back out in the yards. There is a switch tender at the west end of the yard and he whistles for him to go along, that whistle indicates that the engineer is ready. If they want you to go, the switch tender gives you a signal that it is all right. The switch tender works under the instruction of the yardmaster. At Stevens, the yardmaster that operates that end of the yard is at the west end of Stevens. The switch tender is supposed to get his instructions there at the time from the yardmaster to give the signal to let go. When we leave Stevens for Cincinnati through the yards it is under and by the direction of the

yardmaster at the west end of the yard. We were sent by the Big Four over to Stevens to get a cut of cars for the Big Four Railroad, that is, the yardmaster at Harriet Street where the general yardmaster is located for the Big Four Railroad.

[fol. 29] Bernard E. Ruhlick, Witness for Plaintiff

Direct examination by Mr. Cowell:

My name is Bernard E. Ruhlick. I live at 3545 Wisconsin Avenue, Cincinnati, Ohio. I am an engineer on the Big Four Railroad and have been an engineer on the Big Four for eighteen years. I was acquainted with John A. Linstead and was engineer on the freight train at the time he got killed. I was a member of the crew that morning. That morning I was pulling, I think twenty two loads and eighteen empties. I left Stevens with those cars and at the time of the collision I was making between twelve and fifteen miles an hour. The block system on the C. & O. Railroad operates so that if the track is clear and everything is clear, the block, when you approach it, is green; when you go into the block, the block is green, and the one is red—when you go in, the following block is red and the one beyond is yellow. Just as soon as you strike the block it is operated by a circuit, just as soon as you come out of that block, the block drops to red. I saw those block signals on the morning of the collision in which Mr. Linstead was killed. I have a recollection that every block I passed was green. After I passed that last block I couldn't say whether it turned red. It turned on after the engine passed. We never pay any attention to that. All I care for was the block ahead of me. I saw every block that morning.

Q. Was there any fog or smoke or sufficient fog or smoke to obstruct your vision of the block?

Defendant objects to the foregoing question.

The weather conditions were bad. It was foggy. This didn't affect my ability to see the blocks, because I saw them, but not as readily as if it had been clear weather. It affected my vision to a certain extent, but I was able to

see them. I didn't go back to the caboose after the wreck. The first indication I had that there was anything wrong was when we stopped. The air stopped us, when the train run into us, the air stopped on the engine, I didn't stop the train, and we naturally thought that the air was loose. I thought we had broken the air hose. I didn't know just what caused it. At the time I left Stevens, Kentucky, I got a signal from the switch tender at the west end of the yards. The C. & O. switch tender. When we were ready to go, Mr. Linstead said that we were ready to go but the Chippy was due at 3:30 and I think that was about 3:15. He said he would have to go down and see and he walked [fol. 30] all the way down to the yard office and came out and gave me a high ball and he went on, but he went down to see about it first. The switch tender gave him the high ball. I knew about when the Chippy was due. He told me 3:30. He didn't leave until he had permission to leave. We left there about, I think, twenty two when we got out, started away from Stevens, after we got out the caboose and all, I think it was about that time.

Cross-examination by Mr. Galvin:

We didn't leave where we had our cars, I think we were in No. 4 that night. I didn't leave the track until he gave the signal. The signal that I got was the opening of the switch, and the switch tender gave me a signal with a yellow lantern, opened the switch and then gave a signal indicating that the switch is open and lays clear. I was told verbally by a member of my crew that the train was ready to go. I whistled to indicate to my crew and to notify the switch tender and the yardmaster that we were ready. We were held there before the switch was opened long enough for Mr. Linstead to walk down there and get the right of way. I could see him all the time. He got on the train, on the caboose. We had to pull down and back in and pick up our caboose, the caboose was on No. 11 track and I pulled down and backed up just enough, a few car lengths, and picked up the caboose. I was hitched on to my cut of cars when I hitched up the caboose. When we got the caboose and got the air in then my crew gave me a signal to go ahead. That's how I got the signal to move, from my crew, indicated by the lantern. I

couldn't say whether it was Schuler or Linstead gave me that signal. Carr was my head brakeman. He rode that night in the engine. The first notice I had that anything was wrong was when the train stopped. I was so sure that it was a broken hose, or a hole in the line, that I gave Carr a wrench and told him to try the air, and he went back. I didn't go back and didn't know what was back there. In order that we may get a better understanding of the operation of the blocks, take this railing here as a railroad and these two knobs as the block signals, that will sort of make a block. As we come around, this signal (indicating) would be green. After you pass over, it sets red. It is green when you approach it and when you pass it, it gets red. After you pass it goes red, and after you come through this part of it here (indicating), when the caboose passes this block, that goes yellow, then this one [fol. 31] is red, then that goes yellow, then I go through this one, and when I pass this point, or, our caboose passes this point, this block is green and this one yellow. It was red all the time we were in this block. It is red until our caboose passes the second signal or block. When you pass out of this block, the first signal goes green. Those blocks are worked by electricity, the circuit is on the track. The circuit is not made u. til the train passed over it and completes the circuit, as I understand it. It is made through contact with the wheels, over the connection. I didn't pull my train to Riverside that night. After the wreck was over, we made connection with the C. & O. engine, it got ahead of us, and the fireman and I stayed with the engine and we took the train into the Covington yards and then went over with just our engine. I pulled the engine into Covington, helped the C. & O. men. The C. & O. crew took charge of the situation. I don't know a thing about the wreck. At the time my engine stopped, we were very close to one of the blocks, we had passed, I should judge, at the graveyard, around Coal Haven. We had forty one cars and this accident happened at Brick House, then we were just forty one cars beyond that exact point. The rules require us to protect the rear end of our train, if there is a chance of being overtaken, you are supposed to protect at all times, not only passenger trains, but all trains. The

only thing you can do to protect the rear is to throw a fusee down. A fusee is a rod that is about ten inches long, I should judge, and it is lighted and it has a point where it is supposed to stick where it hits and burns ten minutes. The immediate light is just a small blaze, it has to throw that and it is supposed to burn ten minutes. The rear men were to protect the rear end of the train by throwing out the fusee. Linstead was in charge of the train that night and everybody on the train was subject to his orders.

Redirect examination:

I didn't see the caboose after the collision and didn't go back to where the wreck was at all. It is up to the judgment of the men within yard limits where a train is moving ten or fifteen miles an hour, whether to use fusees. He was supposed not to get hit, that's the only thing.

[fol. 32] G. E. Gregory

Direct examination by Mr. Cowell:

My name is G. E. Gregory and I live at 1611 Greenup Street, Covington, Kentucky. I am a locomotive engineer and have been an engineer for sixteen years. I am not working now and I haven't worked since the 15th of August. That was the last work I did for the C. & O. I was engineer on the Chippy that hit Linstead's train. I don't remember how long I had been engineer on the Chippy, about three months I will say. We had a regular schedule, we made four round trips in eight hours, and we were due to leave at 10:15 P. M. on the first trip, that is Covington, and then 3:30 at Stevens and then 1:00 o'clock, I believe at Covington, I am not quite sure, 12:25, I think at Covington, and on this trip we were due to leave there at 3:30 A. M. We backed out on the main line at 3:30, at the east end of Stevens. Going on the last trip up from Stevens before the wreck, I got there about three o'clock. We had to turn the engine every time on account of being a large engine, and that required about thirty minutes, going down to the round house. The engineer is not supposed to know what trains are on the road, you run with current traffic. I did not know that this

freight train was on the road that morning. I first found it out when I hit it. I didn't have to have orders to leave Stevens. We run on a regular schedule. I was in a different portion of the yard when this freight train left Stevens two miles from where that train pulled out. I didn't leave from the same point that this train did. We left from the east end of the yards at Stevens. The freight train left the yards at the west end. When we left there, we didn't get any running order of any kind,—only the right to use the right hand main. We got the right to use that on account of the depot being at Stevens. The two main lines were separated by the yards. We carried employes and anybody that wanted to ride on this train, I suppose. I was just the engineer. We used the eastbound track every trip between the depot and the west end of the yard. We would get from the eastbound track over to the west end, at the west end, Silver Grove or Coney, right across from Conley Island, there's a switch tender crosses you over there. I didn't have to stop to change switches if there's no passengers or anything. You are required to get a signal from that switch tender to go over the cross over. I suppose this is the same switch tender that the freight train [fol. 33] would have to get a signal from to go west. He is the only switch tender there. The same switch tender that let the Linstead train go would let my train go. In running from Stevens to Covington, we know that the track is clear ahead of us by the block. We run by the block. It is my duty to watch those blocks as I pass to see that we have a clear track. If the block was against me, I had to stop. If we cannot distinguish a block, the general rule is, in case of doubt or uncertainty, to run no risk. If I had seen the block I would have stopped. I didn't see the last block I passed before I hit Linstead's train. Under normal circumstances, I know where that block was. I looked for it but didn't know I had passed it until I hit, until I was warned there was a train ahead, by the fireman. You see there was an eastbound train mixed up in this, an eastbound cut going down the hill that I passed just before I got this signal, the place where that signal was, I suppose, anyhow, and that was quite a while before I got to this block, the red block, that I got by. I was putting in an injector in the boiler, performing that operation. This engine was a

rather awkward engine to me to run. I had to get off my seat while I was putting that injector to work. The water from this injector would hit the front window. This would mix with steam, and there was a lot of fog right before I got to this block. It was clear from the Brick House to about I should say eight car lengths of this signal, which I suppose was yellow. I was putting an injector on and looking at the track at the same time, and just caught a flash of yellow, on account of having to look up at the signal from this front window, where ordinarily I would have been back on the seat and would have gotten a better view of it. I just caught a flash of yellow. That could be four different things. If the block was yellow, I had to look out for a train ahead, on account of the next block being red, and this engine was just slowing up, and something the matter with the train would cause that block to go yellow, this block that I was speaking of then. Or it might have been that looking through this window I just caught a flash of yellow that wouldn't have anything to do—I couldn't be sure of the next block, as I passed this train on the east bound, directly after while it was so foggy, the fog was so thick I could hardly see. Then the smoke from this eastbound train mixed with that and then these burning barges too, and while I was looking for that signal, the red signal, I was still looking for that signal when the fireman says [fol. 34] "there's a caboose." Well, I had been thinking that this train on the eastbound had stopped, or something had happened to it. I was looking to see if these cars were moving. Looking through the fog takes two or three times as long to see anything, and I consumed some time looking at that train to see whether it was stationary or moving and then I got by this signal I suppose. When I looked back then I must have been by—I slowed up and then when he said "there's a caboose," I thought he meant this caboose on the eastbound. Then he says "There's a caboose," a little louder. When I first knew there was going to be a collision, I was about four car lengths from it. The caboose was demolished, completely torn to pieces after I hit it.

Q. What was your condition, the condition of your engine after it?

Counsel for defendant objects to above question.

I don't know. The engine was derailed, turned over on the left side, on the hill side. I didn't see Mr. Linstead after the wreck. I got out of my engine right after the wreck and helped get Mr. Schuler out.

Counsel for defendant objects to above answer.

I was not injured in the wreck. My engine was turned over at an angle about like that, towards the hill side on the eastbound main. I noticed that the fire in the fire box was liable to set fire to the wreck and I put out all the fire. My engine was travelling between twenty and twenty five miles an hour at the time it hit, about twenty five miles an hour. I had just one car. We had been going up grade, but at the time we hit I was going perfectly level. I couldn't give any opinion at all as to within what distance I could have stopped on an emergency application of the brakes that morning. I got a flash of yellow out of the front window, it wasn't clear, but I was going to be sure of the next block. That was enough to put me slightly on my guard. After passing a yellow signal it was my duty to reduce speed. In a yellow block, it would be my duty not to pass the next red block, if it had been red. I reduced speed, not with the brake valve, by applying the brake, but by easing off. Before I reduced speed, I was traveling about thirty miles an hour, I guess. Then I reduced the speed from thirty to about twenty five miles an hour. I started to reduce speed, you see, there was a slow order there, twenty-five miles per hour, I was intending to cut down for that too. I was reducing speed both on account of this block and this slow order. A slow order is twenty five miles an hour on a passenger train. This slow order started [fol. 35] from the Brick house and ended at the grave yard. Between Stevens and the Brick House I was going possibly forty miles an hour, and then we either reduced speed by applying the brake without cutting the throttle off on a short passenger train that way before I reduced the air pressure. This yellow signal was the first signal west of Brick House. There is a signal right at Brick House. A slow order begins at the Brick House. This yellow signal I saw was the first signal beyond the Brick House. That is where the fog commenced. It was clear from Altamont

too—about ten car lengths, after this to Coal Haven, and right there at Coal Haven the barges were burning. They had been burning for a couple of nights, and when the fog arose and then the smoke from this Big Four train had helped to make it so dense and the eastbound cut had just passed with an engine shortly before and the smoke of that was mixed with the fog. The barges had been burning there for a couple of nights and they were right at this red signal. I couldn't see the burning barge. I knew approximately where these signals were, they are about two-tenths of a mile, a thousand feet apart. I should judge this wreck occurred about eighteen car lengths from the next red block. It was eighteen cars up to the next red block. There are blocks pretty close together on the hill there, they put them close together on account of the grade, so they will clear it quick. There aren't two red blocks on that particular road at the same time. Each block shows yellow for caution, then red, or green when there is nothing. Green means clear, yellow for caution and red to stop. Jackson was my fireman.

Cross-examination by Mr. Galvin:

After the wreck, I walked from the point where my engine was west approximately eighteen car lengths, which brought me to the next block. The length of a car is about thirty-six feet. This flash of yellow that I referred to was about fifteen car lengths east of Coal Haven. There was a stop there for the commuter train and I had that to think of too. I didn't have to stop there that night. I blowed a whistle though for this stop. I blew my whistle for the Coal Haven station. I gave one long blast. This collision took place about 1,050 feet west of Coal Haven. I was about ten car lengths east of Coal Haven just on the edge of the fog, when I blew my whistle for Coal Haven. I blew the whistle first and then put the injector on, and [fol. 36] while I was performing that operation, I saw the flash of yellow. The yellow was east of Coal Haven. I don't think I made the statement that the yellow didn't necessarily mean that there was a train headed in the same direction, but I meant that there could be other things to make that block show yellow, or I might have seen it

wrong on account of the angle and the reflection of this water on the glass, which appeared yellow. When I got the flash of yellow, the first thing, I kept on putting the injector to work until I got that right, and then I sat down and then I looked to see if anybody was out at Coal Haven that wanted to board the train. I knew I didn't get any signal to stop there, but I had to look, sometimes a fellow would get on and I was watching for that to see if anybody was to get on at that point, or possibly a few car lengths west of there, I met this other on the eastbound? Then the thought came into my mind that the block had been yellow. I didn't see where this eastbound engine was, and I thought I would see if that train was standing still, to be sure of it. When I saw the flash of yellow, I paid some attention, but I had several things to think of. I also reduced speed, about five miles an hour. I don't know as you would call that having my train under control. I reduced my speed from thirty to twenty five miles an hour. I also blew the road crossing whistle. It is the duty of the eastbound cut to flag you if there if anything is the matter with the cut, and in some way I got the impression that that cut wasn't moving. When I made the statement that under normal circumstances I could have seen the block and this night I couldn't see it, I meant the fog was so dense and mixed with smoke from these barges. I was looking out for those blocks. I only missed one completely, didn't see the block. Generally, when running in a fog, the electric headlight shows up kind of a blur, it will show an indication of that blur before it does the light. You can see that the block is there, and then you watch and see the indication of the signal, but I never saw the signal at all or that mast that the block is on. That was the first signal west of Coal Haven. It was a combination of circumstances that caused me to miss this signal, the doing of all these other things. It was necessary for me to work the injector at that time. I just stopped at Altamont to let off a man, and I always shoot off the injector when starting up. I was hauling a passenger train that night, one coach.

[fol. 37] Redirect examination by Mr. Cowell:

This train was used to haul anybody that wanted to ride, if they had the money. After my fireman told me the second time that this caboose was ahead, I saw it then. I am not quite sure that he told me twice, but I saw that it was—if he didn't mean that it was the eastbound caboose that he was talking about, and then I sat up myself and saw this caboose. I hadn't time only to put the brake down in the emergency. He told me twice, and the first time I thought he meant the caboose on the other train. I didn't pay any attention to that, and he told me again. I saw the caboose about the same time that he told me. I was looking out both ways all the time I was pasing this eastbound cut, I was dividing my attention between the right hand side and the left hand side. I was watching this eastbound cut on account of seeing this signal yellow. You see when a train is stopped or balled up over on the other track, that makes that block go yellow too. The eastbound freight does in no way affect my train, but I was watching it on account of seeing this yellow block, this flash of yellow. I don't know how close to the track these block signals were. I don't know the height of the blocks. The engine clear is fifteen and a half feet from the top of the rail. I didn't see the signals.

Q. That was because you were dividing your time, wasn't it?

Counsel for defendant objects.

HERBERT JACKSON

Direct examination by Mr. Cowell:

My name is Herbert Jackson and I live at 413 Baltimore Avenue, Covington. I am a locomotive fireman for the Chesapeake & Ohio Railway Company. I have been with the C. & O. for three years. I was fireman for Mr. Gregory the morning Mr. Linstead was killed. I had been firing on the Chippy off and on for nearly two years, had it regular, I don't know just how long I had been on there then. I can't say just how far I was away from this caboose when

I saw the two red lights. I told Mr. Gregory twice of the caboose being there. After I told him the second time he put the air on. I don't remember what he was doing at the time I told him. The first time I told him, I holloaed at him, I don't remember how loud, but I holloaed at him but [fol. 38] he didn't hear me. He heard me but he didn't understand what I was trying to tell him. When I told him the first time I saw the caboose on our line. I don't know how far before the wreck it was that Mr. Gregory was working with the injector on the engine. He put the injector on, I remember that. The fireman doesn't handle the injector on those engines. That is not his work that he handles the injector only like running the coal or putting the water in the boiler, we don't handle the injector. I was in the habit of looking out for those blocks. I didn't see the yellow block. The last block I saw was at Brick House and that was green. I didn't see the yellow block and I didn't see the red one. I judge that we passed the red block about twenty or twenty five cars before we hit Linstead's train—within eighteen car lengths of the next block, something like that.

Cross-examination by Mr. Galvin:

I couldn't see the blocks when I looked out for them on account of the fog. There was smoke and the fog, they were burning barges down the river.

William J. Neal.

Direct examination by Mr. Cowell:

My name is William J. Neal. I am trainmaster for the Chesapeake & Ohio Railroad and live at 18th and Madison, Covington, I have been trainmaster for The Chesapeake & Ohio Railway Company for about eight years. I have charge of the entire terminal from Stevens to Cincinnati. At Cincinnati my terminal ends right at the other end of the bridge. We operate between the Big Four and the C. & O. Ry. Co. in this way. The Big Four will send their engines to Stevens for cars for their Chicago Division, and then it is offset with or we repay them or reimburse them by send-

ing our engines to Riverside, use for use, of the time that they are on the works, all the time that our yard engines are on our works. In other words, we pay them for use over our road by another engine used with one of our engines. Instead of giving them money, we gave an hour of our crew for an hour of their crew. If that doesn't balance up at the end of the month, no money is transferred. We make it balance. If the Big Four is ahead of us, they will [fol. 39] withdraw some of their cars and we add cars to even it up and vice versa. When their crews are over on our road they are working under our jurisdiction. Under our supervision and control, as far as the work is concerned. I tell them what to do and give them their instructions. They are under my jurisdiction as far as instructions and work is concerned and that includes any crew that is sent over there. I furnish them with time tables and rule books of our road when they come over.

Cross-examination by Mr. Galvin:

The Big Four crews, when it gets over here, does no work except for the Big Four. They handle nothing but Big Four business. When the Big Four crews come over on the C. & O. rails, they do no work in the handling or breaking up of C. & O. trains. They handle cars for the Big Four, if we have cars for them. We don't take our cars and deliver them over in Cincinnati to them, but their crews come over here and deliver them over in our railroad under my supervision and control. A Big Four crew will bring a cut of cars from the Big Four to the C. & O., and if a cut of cars for the Big Four is in the C. & O. yards, to go back to Cincinnati, the Big Four crew will take it back, and if there is no cut for the Big Four and no cars for the Big Four, the crew will go back light. And the C. & O. will haul Big Four cars from Stevens to Riverside in Cincinnati, and if there is a cut in those yards for the C. & O. will bring it back. The crews that handle them for the Big Four are employed by the Big Four people, and they are paid by the Big Four. When over here, no C. & O. official can reprimand or discharge any member of a Big Four crew. I have nothing to do with the contract of employment between the Big Four Railroad and the men coming over here as Big Four men.

Redirect examination by Mr. Cowell:

It is part of my business to deliver these cars from Stevens to the Big Four terminal.

JOHN S. COX

Direct examination by Mr. Cowell:

My name is John S. Cox, and I live at Silver Grove, Kentucky. I am brakeman on the Chesapeake & Ohio Railway and have been on that road for four years. I was on the [fol. 40] commuter train that ran into the Linstead train on August 15th. I don't know much about that wreck. I only know that it happened, that we hit. After we hit, I went back to flag and to protect our train. I was flagman on the commuter. The train that I was flagman on was a passenger train. We had a conductor on there in uniform, collecting tickets. That train is not on the time card. It is run as an extra train and has a schedule of its own. It isn't advertised on any passenger train time card or any other time card.

Cross-examination by Mr. Galvin:

The trains shown on the time card are trains that run beyond Stevens, and the time card don't show anything about what trains operate between Stevens and Covington, not the commuter.

Redirect examination by Mr. Cowell:

I have a local time table, but this commuter is not mentioned on any time table, passenger or freight.

Recross-examination by Mr. Galvin:

The time table only shows passenger trains that come from a point beyond Stevens, but trains that start at Stevens and only go to Cincinnati and Covington are not shown on the time table.

The plaintiff introduced the mortality tables showing the probable duration of the life of plaintiff's intestate is 22.83 years.

MAURICE L. GALVIN

Direct examination by Mr. Cowell:

My name is Maurice L. Galvin and I am an attorney at law. I represent the Chesapeake & Ohio Railway Company, the defendant in this action and have represented them for a long time.

The Court: What is it that you want to prove?

Mr. Cowell: I want to put in his opening statement in the other case.

Objection sustained; to which ruling of the court the plaintiff excepts.

The plaintiff then offered said statement which is as follows:

KATHERINE LINSTEAD, Ex'x, v. C. & O. R'y. Co.

For trial at Covington April 14, 1925

[fol. 41] Statement of Case to Jury by Mr. Galvin, for Defendant

The facts in this case that we expect to develop show this condition:

The Chesapeake & Ohio Railway Company is a railroad operating through the State of Kentucky and in Ohio, and the large terminal yards at what is called Stevens or Silver Grove, a point 10 or 12 miles south of the City of Newport. At that point trains are broken up and re-made. The Chesapeake & Ohio operates trains into these yards, and there they are broken up into cuts of cars and then delivered to what is known as Cincinnati connections—other railroads operating out of Cincinnati that do not come into Kentucky.

I might say here that there is no question but that Mr. Linstead met his death at the time stated in the petition.

The facts we expect to develop are briefly these:

Most of the employes of the C. & O. Road either live in the city of Covington or the city of Newport and it is necessary in the operation of the railroad that it transport its employes from and to their work, and to do so it operates

a passenger car and engine to haul these men in and haul them out—a train designated by the railroad employes as a "jitney." That train, that is schedule to leave Silver Grove, on the morning of the accident left Silver Grove on schedule time.

Mr. Galvin to the Court: Now, if your Honor please, a question of law that will come in this case is this: In the operation of that train between Silver Grove and the city of Cincinnati, was that done by the Big Four Railroad? Mr. Linstead was not a member of a crew of the Big Four Railroad.

The Court: Was he an employe of the C. & O.?

Mr. Galvin: We think that the work being done at the time of this accident was the work of the Chesapeake & Ohio, upon the rails and tracks of the Chesapeake & Ohio, and the Chesapeake & Ohio was delivering these cars from Silver Grove to Cincinnati, and the Big Four had nothing to do with it.

There was an arrangement between the Chesapeake & Ohio and the Big Four by which they exchanged service. The C. & O. would do a service for the Big Four and the Big Four would do a similar service for the C. & O.; and it is our contention that by reason of the work going on Mr. Linstead at that time was an employe of the C. & O. en- [fol. 42] gaged in commerce for the C. & O. and aiding and assisting the C. & O. at that time in its interstate commerce.

The Court: What bearing will that have on the case?

Mr. Galvin: The action ought not to have been brought under the Kentucky statute—but under the Employers' Liability Act. That is a question that we think is for your Honor, and not for the jury.

Now, gentlemen, I have stated to you that this "jitney" train consisted of an engine and one coach, and that it hauled the employes back and forth. It was schedule to leave Silver Grove on the morning of the accident somewhere between 3:30 and 4 A. M. Mr. Linstead, thence conducting that out of freight cars leaving Silver Grove was bound to operate his cut of cars with knowledge of that other cut of cars—or that "jitney" traintable. He left with that Big Four cut of cars, coming on part of the time somewhere about 3:30 in the morning, and this schedule

train was to leave in ten or fifteen minutes later; the proof will show this, The C. & O., the proof will show, had equipped its line of railroad between Stevens, or Silver Grove, and Cincinnati, through Covington, with the modern block signal system. Those signals would indicate when approaching a block if it was being used by another train. That would be indicated by a yellow signal in the nighttime, and then the next signal might be red—red indicating danger. Green would indicate that everything was all right. As I say, yellow would indicate that danger might be ahead at the next block. The railroad did what it conceived to be the best thing, it equipped its road with these automatic signals.

On the morning of this accident, there was a fog on the *the* river and the Chesapeake & Ohio Road, from Silver Grove to the city of Newport *hughe* the Ohio River. There was a fog or mist from the river that morning, and added to that there was smoke that came up to the *fact* of the hill there just east of Dayton, and the smoke and fog were so dense that the engineer of this train was unable to discover or see these signals. The signals were there all right, but he went past the signals without seeing them. The rules of the company required the train in the front to take cognizance of that schedule train coming behind them, and to throw out as a warning to it what are known in railroad parlance as "fusees"—to throw them out from the rear of the train, to show the train following that there is something [fol. 43] ahead of them. Now we purpose to show that Mr. Linstead, the conductor in charge of that cut of cars, failed to put out these warnings to the train following him, to let them know where he was—that he was upon the track ahead, and to notify the train following in the rear to proceed with caution.

Now, the court will instruct you as to the law of the case, and tell you that if you believe it was the duty of Linstead to protect the rear of his train by throwing out these "fusees," and he failed to do so, then that was negligence on his part; and if the case comes under the Kentucky law, this is what is called contributory negligence, and the court will tell you that will be a complete bar to recovery. If, on the other hand, it comes under what is called the Employ-

ers' Liability Act, *then, while that contributory negligence of Linstead Act* then, while that contributory negligence of Linstead is not a complete bar to recovery, it is to be considered in mitigation of damages, if damages are found. If it is shown that he was negligent, then his negligence will *will* be considered or compared with that of the railroad, and your verdict, if any will be reduced to the extent that his negligence compares with the negligence of the railroad company.

Mr. Cowell: I want to offer it.

E. D. Samuels

Direct examination by Mr. Cowell:

My name is E. D. Samuels and I live at 3323 Southside Avenue. I am a Big Four fireman and was fireman on the Linstead train on the morning of August 15, 1924. Mr. Ruddick was my engineer. I could see all the block signals along the road from Stevens to Covington that morning.

Cross-examination by Mr. Galvin:

There was fog that morning. I couldn't notice the smoke for the fog. Our engine was not making a great deal of smoke. At times when we were putting in fire there was smoke.

Plaintiff rests.

At the conclusion of the plaintiff's testimony, comes the defendant, C. & O. Railway Company, by counsel, and moves the Court to instruct the jury peremptorily to find for the [fol. 44] defendant on the ground that the case alleged by plaintiff has not been proven; that the plaintiff's decedent was not at the time of his death employed by the defendant, Chesapeake & Ohio Railway Company; and further that the Federal Employers' Liability Act, under which this action is prosecuted, is not applicable and does not cover this case. The plaintiff objects to defendant's motion, and the court sustains the objection and overruled the motion; to which

ruling of the court the defendant, Chesapeake & Ohio Rail way Company excepts.

Defendant rests.

Comes the defendant and renews the motion for an instructed verdict made at the close of plaintiff's case for the reasons therein stated, and plaintiff objects and the court sustains the objection and overrules the motion, to which ruling the defendant by counsel excepts.

Charge to Jury

The Court: Gentlemen of the jury, this is an action brought under an Act of Congress passed in 1920 which is called the Employers' Liability Act. That act provides that every common carrier engaged in interstate commerce shall be liable in damages, in case of the death of a person employed by it in such commerce, to his personal representatives, for the benefit of the surviving widow and children of such employee for such death resulting from the negligence of any other employee of such carrier. To sum it up, if an employee of a common carrier engaged in interstate commerce loses his life whilst he is engaged in interstate commerce work by reason of the negligence of another employee of such interstate commerce common carrier, such common carrier is liable in damages to his personal representative for the benefit of his widow and children. This action has been brought under that Act of Congress. The plaintiff claims in her petition here that at this time and before that the defendant, Chesapeake & Ohio Railway Company, is an interstate commerce carrier, a common carrier engaged in interstate commerce. That is, in transporting freight and passengers between states. She claims consequently that on the occasion when the commuter train described in the evidence ran into the caboose of the freight train on which the decedent, her former husband, was conductor, that on that occasion the decedent, her husband, was in the employ of the Chesapeake and Ohio Railway and was engaged, whilst so employed, in interstate com- [fol. 45] merce work. She claims further that by reason of

the collision, the decedent, her former husband, was killed. And lastly she claims that that collision and the death of her husband was caused by the negligence of the engineer on the commuter train. By reason of those facts she claims she is entitled to recover, as personal representative, for the damages that have been occasioned to herself and these two sons by reason of that negligent killing. Now, if that claim of hers is true in fact, she is entitled to recover; and if, however, it is not true in fact in any particular, she is not entitled to recover.

First, under the evidence here, you are authorized to believe, you couldn't find otherwise, that the Chesapeake and Ohio Railway is a common carrier engaged in interstate commerce, carrying freight and passengers between the states.

Second, under the evidence you would be authorized to find, you couldn't find otherwise, that the defendant, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work. That is made out in this way:

He was a regular employee of the Big Four Railroad Company, not a regular employee of the Chesapeake & Ohio Railway Company. But at the time of the collision, what he was doing was performing work for the Chesapeake & Ohio Railway and not the work for the Big Four Railroad. He was performing that work under the supervision, direction and control of the Chesapeake and Ohio Railway Company. The Big Four Railroad employed him and alone had a right to discharge him, and paid him wages, but at the time of the collision, by reason of the fact that he was doing the work of the Chesapeake & Ohio Railway Company, and under the general supervision, direction and control of the Chesapeake & Ohio Railway, that made him for the time being, whilst so enaged, the employee of the Chesapeake & Ohio Company. It was the duty of the Chesapeake & Ohio Railway Company to deliver this freight to the Big Four at the Big Four Railroad. It performed that duty and carried out that business not through its own employees but through the employees of the Big Four road and it did so in return for a like service rendered by the Big Four

Railroad Company to the Chesapeake and Ohio Railway Company. So the evidence requires a conclusion that at the time of the collision, the decedent John A. Linstead, was in the employ of the Chesapeake and Ohio Railway, and that he was engaged in interstate commerce work—[fol. 46] that is, he was transporting these freight cars from Kentucky over into Ohio. Now, further, the decedent was killed by reason of the collision, no question can be about that, none as to that so that really the question under the evidence for you to determine is whether or not that collision and Linstead's death was caused by the negligence of Gregory, the engineer on the commuter train. The plaintiff places her right to recover on his negligence and on his negligence alone and she claims that he was negligent in several particulars that he was running his train at an excessive rate of speed under the circumstances existing at that time; then, again, that he did not keep a proper lookout for trains that might be ahead of him; and then further that he did not heed the warning of the block signals, first the yellow signal and then the red. There is no claim here that those block signals were not in proper condition and working and doing their duty and Gregory claims or his position is that he did see a yellow flash to a certain extent, but thought it possibly might be something else and claims that he didn't see the other signal, the red signal, because of the fog and the smoke and other things. It is for you to say whether or not he saw those signals under the evidence and paid the proper attention to those signals. It is claimed by the plaintiff that Gregory was negligent, he was running at too high speed under the conditions then existing at that time, and that he didn't keep a proper lookout and that he didn't pay attention to these two signals, the red and the yellow, the caution and the stop signal. If you believe from the evidence that Gregory was negligent in either one of those particulars, or all of them, and such negligence was the cause of the collision, it is your duty to find for the plaintiff in this case. Otherwise it is your duty to find for the defendant.

If, after considering this branch of the case, you consider that the plaintiff is entitled to recover, you then should approach the question as to the amount of recovery. The measure of damages in a case of this sort is different from

what perhaps any of you have ever had any experience of heretofore. That is the first case under the Employers' Liability Act that I recall having in this court. So that no jury, or any of you who have been before, have had an occasion to try one. The rule of the measure of damages under the States' statute in recovery for a death is different from what it is under the Employers' Liability Act. In the first place, what can be recovered as compensation for pecuniary loss? No recovery can be had for injury to feel [fol. 47] ings or loss of society or company, it can only be pecuniary loss that the widow and these two sons have sustained by reason of the death of the husband and of the father. They have been deprived by reason of his death of pecuniary advantages growing out of his life, and it is such a sum as would reasonably compensate them for the loss of that, being deprived of the reasonable expectation of pecuniary damages as to the widow during her widowhood and dependency, legal dependency, pending it, and the two boys during their minority. One of them is seventeen years of age, was at the time of the death, and the other was twelve, and the minority of one would last four years and of the other nine years from the time of the collision and the death of their husband and father. I should say further in determining this question you take into consideration the probable life of the deceident had he not been killed and his probable earnings during his lifetime and then that the probable pecuniary advantage that the widow would have received from him during her widowhood and dependency and the probable pecuniary advantage that the boys would have received from him during their dependency and infancy until they were twenty-one years of age. There must be a certain deduction from this amount as to one particular. Had he lived, the widow and boys would not have received the pecuniary advantage at once. They would only have received it in the future, one year and two years and three years and so on. The sum that is allowed them, they get now, in hand, a lump sum. In other words, one hundred dollars is worth more now than it would be ten years hence or twenty years hence, because if you have it now, you might let it out and earn interest on it, get an income from it. So the rule is that it is the present cash value of the pecuniary advantage

that would have accrued to the widow and boys had he not been killed. There is another possible deduction that should be made in this case and it all depends on what you find is the fact in regard to the matter? The act provides that damages shall be diminished by the jury in proportion to the amount of negligence attributable to, such employee? If Linstead himself was guilty of negligence on his part, and that negligence on his part contributed to this collision, but for which there would not have been any collision, then the jury should compare his negligence with the negligence of Gregory, and should diminish the amount of recovery by the proportion that Linstead's negligence bears to the negligence of Gregory.

It is claimed in this case that Linstead was negligent in not protecting his train from that commuter train and not [fol. 48] seeing that it was protected either by himself or seeing it done. There are particulars in which he should have protected it, such as not having those red lights on the end of caboose burning or throwing out a fusee. There is no claim here that the red lights were not burning and it is a question for you to determine under this evidence whether proper care on his part required that he should have seen that a fusee was thrown out on the track, and that if he had done so, this collision would not have happened. If you reach the conclusion that he was guilty of contributory negligence and in that particular, it is not a defense to this cause of action, but you should diminish the amount of recovery by the proportion that the negligence on his part in that particular bears to the negligence of Gregory.

I can say to you what I have intended to say heretofore in a more summary form:

If you find for the plaintiff, your verdict should be for the present cash value of the pecuniary benefit which you believe from the evidence the widow and children of decedent would with reasonable certainty have obtained, or would in the future, and while his wife and children would with reasonable certainty have been dependent, but not beyond the widowhood of such widow not in the case of said children, beyond the date when they become twenty-one years of age. If, however, you believe from the evidence that at the time and under the circumstances the decedent

was himself negligent and that such negligence contributed towards causing his death, then any finding you make for the plaintiff must be diminished in a proportionate amount; if you believe from the evidence that the negligence which caused his death is partly attributable to decedent, the plaintiff is not entitled to recover full damages, but only a proportionate amount, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both. That covers the law of the case, as I consider it to be, and if you find for the plaintiff, be reasonable in your verdict.

Mr. Galvin: The defendant excepts to that part of the charge of the court stating that Mr. Linstead was in the employ of the C. & O. Railway Company and at the time of this collision was performing work for the C. & O. Railway engaged in interstate commerce for the C. & O. Railway. We also want to except to that part of the charge in [fol. 49] which your Honor has stated that it was the duty of the C. & O. to deliver cars in question to the Big Four at Cincinnati.

Thereupon the jury retired from the court room and subsequently returned into the jury box and rendered a verdict in favor of the plaintiff.

And for as much as the matters set forth do not fully appear of record the defendant tenders this its Bill of Exceptions and prays that same may be signed and sealed by the Judge of this Court pursuant to law.

Galvin & Tracy, Attorneys for Defendant.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions is correct in all respects and contains all the evidence offered in the case and is hereby approved, allowed and filed and made part of the record herein.

Done in open court and dated this 11th day of February, 1926.

A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky.

PLAINTIFF'S EXHIBIT No. 1.

Cleveland, Cincinnati, Chicago & St. L. Ry. Co.
loye's Advice
Deductions— I 801
Second Half of MARCH 31, 1924

Total Earned	Deduction	For Whom
177 30	10 00	OBRRTS

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.
Employe's Advice
of Deductions— I 759
for First Half of APRIL 15, 1924

Total Earned	Deduction	For Whom
158 84	10 00	OB RTS

EMPLOYE TO RETAIN THIS STUB

Cleveland, Cincinnati, Chicago & St. L. Ry. Co.
loye's Advice
eductions— I 741
Second Half of APRIL 30, 1924

Total Earned	Deduction	For Whom
139 12	10 00	OB RTS

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.
Employe's Advice
of Deductions— I 734
for Second Half of MAY 31, 1924

Total Earned	Deduction	For Whom
119 41		

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.
Employe's Advice
of Deductions— I 737
for First Half of MAY 15, 1924

Total Earned	Deduction	For Whom
122 84	10 00	OB RTS

EMPLOYE TO RETAIN THIS STUB

Plaintiff's Exhibit No. 1

The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.

Employe's Advice of Deductions— I 745

for First Half of JUNE 15, 1924

Total Earned	Deduction	For Whom
143 48		

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.

Employe's Advice of Deductions— I 735

for First Half of JULY 15, 1924

Total Earned	Deduction	For Whom
156 25		

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. C

Employe's Advice of Deductions— I 74

for Second Half of JUNE 30, 192

Total Earned	Deduction	For Whom
161 65		

EMPLOYE TO RETAIN THIS STUB

The Cleveland, Cincinnati, Chicago & St. L. Ry. C

Employe's Advice of Deductions— I 73

for Second Half of JULY 31, 192

Total Earned	Deduction	For Whom
180 32		

EMPLOYE TO RETAIN THIS STUB

COPY BOUND CLOSE IN CENTER

In United States District Court

Præcipe for Transcript of Record—Filed February 23, 1926

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, pursuant to a writ of error allowed in the above entitled cause and include in such transcript of record the following papers, towit:

1. Petition.
2. Answer.
3. Reply.
4. Impaneling and swearing of jury.
5. Verdict.

[fol. 50] 6. Motion for new trial.

7. Order overruling motion for new trial and judgment on the verdict.
8. Bill of exceptions duly taken at the trial.
9. Petition for writ of error.
10. Assignment of errors.
11. Bond and approval.
12. Allowance of writ of error.
13. Writ of Error.
14. Citation.
15. This præcipe and stipulation.
16. Clerk's certificate.

It is stipulated by and between counsel for plaintiff, Katherine Linstead, executrix of the estate of John A. Linstead, and for the defendant, The Chesapeake and Ohio Railway Company, that the foregoing shall constitute the record on the writ of error filed herein.

John W. Cowell, Attorney for Plaintiff. Galvin & Tracy, Attorneys for Chesapeake & Ohio Railway Co.

Clerk's certificate to foregoing transcript omitted in printing.

(Here follows Plaintiff's Exhibit No. 1, marked side folio pages 51 and 52)

[fol. 53] PLAINTIFF'S EXHIBIT No. 2

New York Central Lines

The Cleveland, Cincinnati, Chicago & St. Louis Railway Co., The Cincinnati Northern Railroad Company

F. Kenney, Paymaster. H. L. Kershner, Ass't Paymaster

Cincinnati, O., April 13, 1925.

Statement of Wages Earned by John A. Linstead, Employed as a Freight Conductor by the C., C., C. & St. L. Ry. Co. from August 15, 1923, to August 15, 1924

August 15th to 31st, 1923	$94 80
September 1st to 15th	95 69
September 15th to 30th	94 80
October 1st to 15th	100 13
October 15th to 31st	101 81
November 1st to 15th	95 99
November 15th to 30th	77 03
December 1st to 15th	82 46
December 15th to 31st	82 46
January 1st to 15th, 1924	101 32
January 15th to 31st	102 31
February 1st to 15th	101 46
February 15th to 29th	95 45
March 1st to 15th	99 91
March 15th to 31st	177 30
April 1st to 15th	158 84
April 15th to 30th	139 12
May 1st to 15th	122 84
May 15th to 31st	119 41
June 1st to 15th	143 48
June 15th to 30th	161 65
July 1st to 15th	156 25
July 15th to 31st	180 32
August 1st to 15th	156 54
Total	$2,841 37

H. L. Berg, Auditor of Disbursements.

THE CHES

PLAINTIFF'S EXHIBIT No. 4.

SAFETY
C. & O.
FIRST

For information of employes only—not intended for th

J. B. PARRISH,
General Manager

A. T. LOWMASTER,
Superintendent

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

WESTERN GENERAL DIVISION.

'S EXHIBIT No. 4.

CINCINNATI, NORTHERN AND RUSSELL DIVISIONS

Time Table No. 115

TO TAKE EFFECT AT 5.00 A. M. (CENTRAL TIME),

Sunday, May 4, 1924.

BOOK OF RULES DATED JANUARY 1, 1899, GOVERNS THE RIGHTS OF TRAINS

DESTROY ALL TIME TABLES OF PREVIOUS DATE.

Read the Instructions

employes only—not intended for the information of the public, and not an advertisement of the time of trains. The right is reserved to vary time

Trains run on Central (90th Meridian) Standard Time.

A. T. LOWMASTER, Superintendent Transportation	**E. L. BOCK,** General Superintendent	**W. S. Taylor,** Superintendent Cincinnati and Northern Divisions

[illegible] Printing Co., Richmond, Va.

SAPEAKE AND OHIO RAILWAY COMPANY

WESTERN GENERAL DIVISION.

CINCINNATI, NORTHERN AND RUSSELL DIVISIONS

Time Table No. 115

TO TAKE EFFECT AT 5.00 A. M. (CENTRAL TIME),

Sunday, May 4, 1924.

SAFETY
C. & O.
FIRST

BOOK OF RULES DATED JANUARY 1, 1920, GOVERNS THE RIGHTS OF TRAINS

DESTROY ALL TIME TABLES OF PREVIOUS DATE.

Read the Instructions

e information of the public, and not an advertisement of the time of trains. The right is reserved to vary time of trains without notice.

Trains run on Central (90th Meridian) Standard Time.

, Transportation	E. L. BOCK, General Superintendent	W. S. Taylor, Superintendent Cincinnati and Northern Divisions	W. S. BUTLER, Superintendent Russell Division

Mitchell & Hotchkiss Print, Richmond, Va.

CINCINNATI DIVISION

THIRD CLASS.		SECOND CLASS.				FIRST CLASS.			TIME TABLE No. 115. In Effect Sunday, May 4, 1924. STATIONS.	Distance from Russell	Calls	Hours Open
99 Daily	99 Daily	7 Daily	17 Daily Ex. Sun.	19 Daily Ex. Sun.	101 Daily	3 Daily	1 Daily	5 Daily				
Lv AM	Lv AM	Lv PM	Lv AM	Lv AM	Lv AM	Lv PM	Lv AM	Lv AM				
----------	----------	1 55 a	6 31	----------	1 00	1 51 7	8 06	4 16	Wty RUSSELL	.0	RD	12.15 p. m. to 9.15 p. m.
----------	----------	1 56	6 32	----------	1 01	1 52	8 07	4 17	0.4 R. U. Cabin	0.4	RU	Continuous
11 00	2 00	1 59	6 36	----------	1 06	1 55	8 10	4 20	1.5 M. S. Cabin	1.9	MS	Continuous
11 20	2 20	a 2 10	a 6 50	----------	1 15	2 03	8 18	4 29	5.9 Riverton	7.8	M	Continuous
11 23	2 23	a 2 14	a 6 55	----------	1 17	2 04	8 19	4 30	0.7 Greenup (8)	8.5	----------	----------
11 45	2 45	2 26	7 09	----------	1 26	2 13	8 28	4 39	7.0 W D. O. Cabin	15.5	DG	Continuous
11 53	2 53	f 2 31	f 7 14	----------	1 29	2 16	8 31	4 43	2.6 Limaville	18.1	MV	Continuous
12 20	3 20	a 2 55	a 7 39	----------	a 1 45	a 2 30	a 8 45	a 4 57	8.5 W South Portsmouth	26.6	SV	7.00 a. m. to 4.00 p. m.
12 40	3 40	3 05	7 51	----------	1 57	2 40	8 55	5 07	5.2 O. M. Cabin	31.8	GN	Continuous
1 00	4 00	a 3 21	a 8 10	----------	2 08	2 49	9 04	5 16	7.3 Wy Garrison	39.1	KD	7.00 a. m. to 4.00 p. m.
1 15	4 15	3 31	8 22	----------	2 16	2 56	9 11	5 24	5.9 R. V. Cabin	45.0	----------	----------
1 22	4 22	a 3 37	a 8 30	----------	2 22	3 00	9 15	f 5 30	3.2 Vanceburg (9)	48.2	VA	Continuous
1 30	5 00	a 3 59	a 8 57	----------	2 42	3 14	9 29	5 45	11.6 W Concord (9)	59.8	----------	----------
2 00	5 12	4 06	9 06	----------	2 48	3 19	9 34	5 50	3.5 R. O. Cabin	63.3	RO	Continuous
2 06	5 20	a 4 13	a 9 15	----------	2 55	3 24	9 39	5 56	3.5 Trinity	66.8	----------	----------
2 22	5 35	f 4 22	f 9 25	----------	3 03	3 30	9 45	6 03	5.1 Springdale	71.9	----------	----------
2 39	5 55	a 4 45	9 45	5 25	a 3 16	a 3 40	a 9 55	a 6 14	6.0 Wt Maysville (9)	77.9	RT	Continuous
2 52	6 21 9	4 54	----------	5 32	3 28	3 50	10 05	6 21 10	4.1 R. H. Cabin	82.0	----------	----------
3 05	6 45	a 5 01	----------	a 5 38	3 35	3 55	10 10	6 27	4.1 South Ripley	86.1	----------	----------
3 20	7 00	a 5 06	----------	a 5 43	3 39	3 58	10 13	6 31	2.3 Dover (8)	88.4	DV	8.45 a. m. to 5.45 p. m.
3 32	7 10	5 10	----------	5 48	3 43	4 01	10 16	6 35	2.4 W Stoney Point	90.8	----------	----------
3 45	7 30	a 5 21	----------	a 5 53	3 49	f 4 07	10 22	6 42	4.1 Augusta (9)	94.9	AG	5.20 a. m. to 2.20 p. m.
4 18 9	7 50	5 32	----------	6 07	3 59	4 18 m	10 31	6 51	7.1 W. O. Cabin	102.0	WG	Continuous
4 40	8 20	a 5 47	----------	a 6 17	4 06	4 22	10 37	6 57	4.7 W Foster	106.7	----------	----------
5 30	8 55	6 09	----------	6 39	4 20	4 34	10 49	7 11	10.5 D. N. Cabin	117.2	DN	Continuous
5 35	9 00	a 6 11	----------	a 6 42	4 22	4 36	10 51	7 13	1.2 New Richmond	118.4	----------	----------
6 30	9 45	a 6 27	----------	a 7 00	4 35	4 47	11 02	7 24	8.1 C. S. Cabin	126.5	CS	Continuous
----------	----------	6 29	----------	7 02	4 37	4 48	11 03	7 25	0.6 W Stevens	127.1	----------	----------
----------	----------	a 6 33	----------	a 7 06	4 41	4 52	11 07	7 30	1.5 Coney	128.6	----------	----------
----------	----------	a 6 53	----------	a 7 27	f 5 04	a 5 10	a 11 26	a 7 52	8.4 W Newport	137.0	NX	Continuous
----------	----------	a 6 58	----------	a 7 31	5 11	5 16	11 32	7 59	1.6 K. C. Junction	138.6	----------	----------
----------	----------	a 7 05	----------	a 7 34	f 5 17	a 5 20	a 11 36	a 8 05	0.8 W Covington	139.4	----------	----------
----------	----------	7 15	----------	7 45	5 30	5 30	11 45	8 20	1.6 W CINCINNATI	141.0	{GC CX}	Continuous 8.45 a. m. to 5.45 p. m.
Ar PM	Ar AM	Ar PM	Ar AM	Ar AM	Ar AM	Ar PM	Ar AM	Ar AM				
99 Daily	99 Daily	7 Daily	17 Daily Ex. Sun.	19 Daily Ex. Sun.	101 Daily	3 Daily	1 Daily	5 Daily				

						THIRD CLASS.	
						95 Daily	99 Daily
						Lv AM	Lv AM
						11 00	2 00
						11 20	2 20
						11 23	2 23
						11 45	2 45
						11 53	2 53
						12 20	3 20
						12 40	3 40
						1 00	4 00
						1 15	4 15
						1 22	4 22
						1 30	5 00
						2 00	5 12
						2 08	5 20
						2 22	5 35
						2 39	5 55
						2 52	6 21
						3 05	6 45
						3 20	7 00
						3 32	7 10
						3 45	7 30
						4 18	7 50
						4 40	8 20
						5 30	8 55
						5 35	9 00
						6 30	9 45
						Ar PM	Ar AM
						95 Daily	99 Daily

CINCINNATI DIVISION

SECOND CLASS.				FIRST CLASS.		
7 Daily	17 Daily Ex. Sun.	19 Daily Ex. Sun.	101 Daily	3 Daily	1 Daily	5 Daily
Lv PM	Lv AM	Lv AM	Lv AM	Lv PM	Lv AM	Lv
1 55 s	6 31	----------	1 00	1 51 r	8 06	4 16
1 56	6 32	----------	1 01	1 52	8 07	4 17
1 59	6 36	----------	1 06	1 55	8 10	4 20
s 2 10	s 6 50	----------	1 15	2 03	8 18	4 28
s 2 14	s 6 55	----------	1 17	2 04	8 19	4 30
2 26	7 09	----------	1 26	2 13	8 28	4 39
f 2 31	f 7 14	----------	1 29	2 16	8 31	4 43
s 2 55	s 7 39	----------	s 1 45	s 2 30	s 8 45	s 4 57
3 05	7 51	----------	1 57	2 40	8 55	5 07
s 3 21	s 8 10	----------	2 08	2 49	9 04	5 16
3 31	8 22	----------	2 16	2 56	9 11	5 24
s 3 37	s 8 30	----------	2 22	3 00	9 15	f 5 30
s 3 59	s 8 57	----------	2 42	3 14	9 29	5 45
4 06	9 06	----------	2 48	3 19	9 34	5 50
s 4 13	s 9 15	----------	2 55	3 24	9 39	5 56
f 4 22	f 9 25	----------	3 03	3 30	9 45	6 03
s 4 45	9 45	5 25	s 3 16	s 3 40	s 9 55	s 6 14
4 54	----------	5 32	3 28	3 50	10 05	6 21
s 5 01	----------	s 5 38	3 35	3 55	10 10	6 27
s 5 06	----------	s 5 43	3 39	3 58	10 13	6 31
5 10	----------	5 48	3 43	4 01	10 16	6 35
s 5 21	----------	s 5 53	3 49	f 4 07	10 22	6 41
5 32	----------	6 07	3 59	4 16 m	10 31	6 51
s 5 47	----------	s 6 17	4 06	4 22	10 37	6 57
6 09	----------	6 39	4 20	4 34	10 49	7 11
s 6 11	----------	s 6 42	4 22	4 36	10 51	7 13
s 6 27	----------	s 7 00	4 35	4 47	11 02	7 24
6 29	----------	7 02	4 37	4 48	11 03	7 25
s 6 32	----------	s 7 06	4 41	4 52	11 07	7 30
s 6 53	----------	s 7 27	f 5 04	s 5 10	s 11 26	s 7 50
s 6 58	----------	s 7 31	5 11	5 16	11 32	7 56
s 7 05	----------	s 7 34	f 5 17	s 5 20	s 11 36	s 8 03
7 15	----------	7 45	5 30	5 30	11 43	8 2
Ar PM	Ar AM	Ar AM	Ar AM	Ar PM	Ar AM	Ar
7 Daily	17 Daily Ex. Sun.	19 Daily Ex. Sun.	101 Daily	3 Daily	1 Daily	5 Daily

Side Track Capacity in Cars 45 Ft.	Distance from Cincinnati.		TIME TABLE No. 115. In Effect Sunday, May 4, 1924. STATIONS.	FIRST CLASS. 6 Daily	2 Daily	4 Daily	SECOND CLASS. 8 Daily	16 Daily Ex. Sun.	18 Daily Ex. Sun.	106 Daily	THIRD CLASS. 92 Daily	
				Ar AM	Ar PM	Ar AM	Ar PM	Ar PM	Ar PM	Ar AM	Ar AM	Ar
	141.0	Wty	RUSSELL	11 57	3 40	12 55	12 13	5 00	----------	12 40	----------	----
Yard	140.6		R. U. Cabin	11 56	3 39	12 54	12 12	4 58	----------	12 37	----------	----
	139.1		M. S. Cabin	11 53	3 36	12 51	12 09	4 55	----------	12 31	7 45	
c 68 o 19	133.2		Riverton	11 44	3 27	12 42	s 11 56	s 4 42	----------	12 21	7 15	
o 22	132.5		Greenup	11 43	3 26	12 41	s 11 54	s 4 37	----------	12 20	7 10	
s 118 w 192 o 8	125.5	W	D. G. Cabin	11 35 s	3 17 ss	12 31	11 35 s	4 22	----------	12 07	6 50	
o 13	122.9		Limeville	11 32	3 14	12 28	f 11 18	f 4 15	----------	12 03	6 40	
o 52	114.4	W	South Portsmouth	s 11 21	s 3 01	s 12 15	s 10 58	s 3 52	----------	s 11 50	6 15	
s 107 w 117 o 10	109.2		G. N. Cabin	11 14	2 51	12 05	10 43	3 40	----------	11 39	5 55	
c 133 o129	101.9	Wy	Garrison	11 06	2 42	11 56	s 10 30	s 3 24	----------	11 30	5 25	
s 135 w 109 o 9	96.0		B. V. Cabin	10 59	2 35	11 48	10 18	3 11	----------	11 22	5 00	
o 27	92.8		Vanceburg	10 55	2 31	f 11 44	s 10 12	s 3 05	----------	11 17	4 50	
s 130 o 47	81.2	W	Concord	10 42	2 17	11 29	s 9 48	s 2 40	----------	11 03	4 15	
s 114 w 87	77.7		R. O. Cabin	10 38	2 12	11 24	9 41	2 33	----------	10 58	4 00	
o 22	74.2		Trinity	10 34	2 07	11 19	s 9 35	s 2 27	----------	10 52	3 50	
o 13	69.1		Springdale	10 28	2 01	11 12	s 9 25	s 2 15	----------	10 45	3 35	
Yard	63.1	Wt	Maysville	s 1018	s 1 50	s 11 00	s 9 12	2 00	7 25	s 10 30	3 00	
s 130 w 107 o 8	59.0		R. H. Cabin	10 09	1 41	10 51	9 01	----------	7 10	10 20	2 45	
o 20	54.9		South Ripley	10 04	1 36	10 46	s 8 55	----------	s 7 05	10 15	2 35	
o 13	52.6		Dover	10 01	1 33	10 43	s 8 50	----------	s 6 58	10 12	2 25	
c 125 o 17	50.2	W	Stoney Point	9 58	1 30	10 40	8 45	----------	6 53	10 08	2 15	
o 45	46.1		Augusta	9 52	f 1 24	10 34	s 8 37	----------	s 6 45	10 02	2 00	
s 71 w 73	39.0		W. G. Cabin	9 44 ss	1 15	10 25	8 21	----------	6 29	9 53	1 35	
o 40	34.3	W	Foster	9 38	1 09	10 19	s 8 09	----------	s 6 17	9 46	1 15	
s 111 w 111 o 7	23.8		D. M. Cabin	9 26	12 57	10 06	7 49	----------	5 52	9 31	12 45	
o 8	22.6		New Richmond	9 24	12 55	10 04	s 7 47	----------	s 5 50	9 29	----------	
	14.5		C. S. Cabin	9 14	12 44	9 53	7 31	----------	5 31	9 17	12 15	
	13.9	Wt	Stevens	9 13	12 43	9 52	s 7 30	----------	s 5 30	9 16	----------	
	12.4		Coney	9 11	12 39	9 48	7 25	----------	f 5 25	9 13	----------	
Yard	4.0		Newport	s 8 57	s 12 19	s 9 28	s 7 02	----------	s 5 03	f 8 54	----------	
	2.4	W	K. C. Junction	8 52	12 14	9 23	s 6 57	----------	s 4 57	8 50	----------	
	1.6	Wt	Covington	s 8 49	s 12 10	s 9 20	s 6 55	----------	s 4 52	f 8 48	----------	
	0.0	W	CINCINNATI	8 40 Lv AM	12 01 Lv PM	9 10 Lv PM	6 45 Lv AM	Lv PM	4 45 Lv PM	8 40 Lv PM	Lv AM	Lv
				6 Daily	2 Daily	4 Daily	8 Daily	16 Daily Ex. Sun.	18 Daily Ex. Sun.	106 Daily	92 Daily	

CINCINNATI DIVISION.

56-A

EASTWARD

FIRST CLASS.		SECOND CLASS.				THIRD CLASS.											
2 Daily	4 Daily	8 Daily	16 Daily Ex. Sun.	18 Daily Ex. Sun.	106 Daily	92 Daily	98 Daily										
Ar PM	Ar AM	Ar PM	Ar PM	Ar PM	Ar AM	Ar AM	Ar PM										
3 40	12 55	12 13	5 00		12 40												
3 39	12 54	12 12	4 58		12 37												
3 36	12 51	12 09	4 55		12 31	7 45	4 15										
3 27	12 42	s 11 56	s 4 42		12 21	7 15	3 50										
3 26	12 41	s 11 54	s 4 37		12 20	7 10	3 45										
3 17	12 31	11 35	4 22		12 07	6 50	3 17										
3 14	12 28	f 11 18	f 4 15		12 03	6 40	2 55										
s 3 01	s 12 15	s 10 58	s 3 52		s 11 50	6 15	2 30										
2 51	12 05	10 43	3 40		11 39	5 55	2 10										
2 42	11 56	s 10 30	s 3 24		11 30	5 25	1 45										
2 35	11 48	10 18	3 11		11 22	5 00	1 20										
2 31	f 11 44	s 10 12	s 3 05		11 17	4 50	1 10										
2 17	11 29	s 9 48	s 2 40		11 03	4 15	12 25										
2 12	11 24	9 41	2 33		10 58	4 00	12 10										
2 07	11 19	s 9 35	s 2 27		10 52	3 50	12 00										
2 01	11 12	s 9 25	s 2 15		10 45	3 35	11 45										
s 1 50	s 11 00	s 9 12	2 00	7 25	s 10 30	3 00	11 05										
1 41	10 51	9 01		7 10	10 20	2 45	10 50										
1 36	10 46	s 8 55		s 7 05	10 15	2 35	10 35										
1 33	10 43	s 8 50		s 6 58	10 12	2 25	10 25										
1 30	10 40	8 45		6 53	10 08	2 15	10 15										
f 1 24	10 34	s 8 37		s 6 45	10 02	2 00	10 05										
1 15	10 25	8 21		6 29	9 53	1 35	9 44										
1 09	10 19	s 8 09		s 6 17	9 46	1 15	9 10										
12 57	10 06	7 49		5 52	9 31	12 45	8 45										
12 55	10 04	s 7 47		s 5 50	9 29												
12 44	9 53	7 31		5 31	9 17	12 15	8 15										
12 43	9 52	s 7 30		s 5 30	9 16												
12 39	9 48	7 25		f 5 25	9 13												
s 12 19	s 9 28	s 7 02		s 5 03	f 8 54												
12 14	9 23	s 6 57		s 4 57	8 50												
s 12 10	s 9 20	s 6 55		s 4 52	f 8 48												
12 01	9 10	6 45		4 45	8 40												
Lv PM	Lv PM	Lv AM	Lv PM	Lv PM	Lv PM	Lv AM	Lv AM										
2 Daily	4 Daily	8 Daily	16 Daily Ex. Sun.	18 Daily Ex. Sun.	106 Daily	92 Daily	98 Daily										

CINCINNATI DIVISION.

WESTWARD — **KINNICONNICK & FREESTONE BRANCH.** — **EASTWARD**

TIME TABLE No. 115.
In Effect Sunday, May 4, 1924.

Calls	Distance from Garrison.	SECOND CLASS. 127 Daily Ex. Sun.		STATIONS	SECOND CLASS. 128 Daily Ex. Sun.	Side Track Capacity in Cars. (45 ft.)
		Lv AM			Ar AM	
3 short	19.8	11 30	Wy	**CARTER**	11 10	o 13
	19.2	11 35		0.6 **Rock Crusher**	11 05	Yard
2 short	18.1	f11 45		1.1 **Poplar**	f11 00	o 2
	16.2	f12 00	W	1.9 **Smith Creek**	f10 40	o 4
7 short	15.3	f12 15		0.9 **Deep Cut**	f10 20	o 2
6 short	14.1	f12 30		1.2 **Trace**	f10 00	o 7
4 short	12.6	f12 40		1.3 **Ruggles**	f 9 45	o 3
5 short	8.1	f 1 00		4.5 **Tannery**	f 9 20	o 39
	5.2	f 1 20		2.9 **Sullivan**	f 9 05	o 7
	4.0	f 1 40		1.2 **Bruce**	f 8 55	o 8
1 long	.0	2 10 Ar PM	Wy	4.0 **GARRISON**	8 40 Lv AM	o129
		127 Daily Ex. Sun.			128 Daily Ex. Sun.	

WESTWARD — **NORTHERN DIVISION** — **TIME TABLE No. 1** — **In Effect Sunday May 4**

Calls	Hours Open	Distance from Limeville	FOURTH CLASS. 75 Daily	FOURTH CLASS. 73 Daily	FOURTH CLASS. 71 Daily	THIRD CLASS. 95 Daily	THIRD CLASS. 99 Daily		STATIONS.
MV	Continuous	.0	Lv PM 11 20	Lv PM 8 00	Lv AM 6 00	Lv PM 1 00	Lv AM 3 45		**LIMEVILLE**
		4.0	11 40	8 25	6 25	1 50 98	4 10		4.0 **Sciotoville**
WR	Continuous	9.4	12 15	9 00	7 00	2 15	4 45 92	W	5.4 **Wheeler**
		13.1	12 35	9 20	7 20	2 35	5 05		3.7 **Marshall**
		17.8	1 00	9 45	7 45	2 55	5 30		4.7 **County Line**
X	Continuous	21.4	1 25	10 05	8 05	3 15	5 50		3.6 **Apex**
RB	Continuous	24.2	1 50	10 30	8 30	3 40	6 15	W	2.8 **Robbins (E.**
G	Continuous	28.2	2 20 92	11 00	9 00	4 05	6 45	Wy	4.0 **Gregg (W.**
		30.6	2 40	11 20	9 20	4 25	7 05		3.2 **N. & W. CONNECTI**
SX	Continuous	31.2							0.6 **Glen Jean**
SK	Continuous	92.5	7 00	3 40	1 40	8 45	11 25		61.3 **Valley Crossing**
PA	Continuous	95.4	Ar AM 7 20	Ar AM 4 00	Ar PM 2 00	Ar PM 9 00	Ar AM 11 45	Wt	2.9 **PARSONS**
			75 Daily	73 Daily	71 Daily	95 Daily	99 Daily		

NORTHERN DIVISION.

GENERAL INSTRUCTIONS.

SINGLE TRACK.—Eastward trains are superior to Westward trains of the same class. (See Rule 81.)

DOUBLE TRACK.—Trains will run on the right-hand track, and will not cross-over to the left-hand track, unless under protection. (See Rules 99, 311 and 337 and General Instructions F).

A.—Standard clocks located in telegraph offices at Russell and Parsons.

B.—Bulletin books and watch register blanks located at Russell, Gregg and Parsons.

D.—Maximum speed—

Approaching the ends of Double track and Gauntlets, passenger trains must reduce speed to 20, freight trains to 15 miles per hour at a sufficient distance therefrom to insure ability to stop if necessary.

All trains 20 miles per hour.

Through yards protected by "Yard Limit" boards, all trains 10 miles per hour.

Engines running backward, with or without cars, 12 miles per hour.

E.—Junctions and Crossings—

Limeville ..... Junction of Cincinnati Division and Northern Division.

Gregg ..... Junction of Northern Division and D. T. & I. Railroad.

N. & W. Connection ..... Junction of Northern Division and N. & W. Railway. (Interlocked.)

F.—When necessary to divert a train to the opposite running track the train order should be worded: "No. — will use the ——— ward track ——— to ———, and has right over all ——— ward trains."

When a train crosses over to, or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by Rule 99 in both directions on that track.

When, from any cause an engine, under steam, is cut out of a train at a non-telegraph station, the train must stop at the next open telegraph office and report the circumstances to the train dispatcher. The engine cut out must not use a main track unless protected in accordance with Rule 99, or by train orders.

G.—Fourth class trains will not require train orders to run ahead of third class trains. Extra trains will not require train orders to run ahead of third and fourth class trains.

H.—When required to take siding, a train will enter at first switch of the passing siding. An eastward train will not use a westward nor a westward train an eastward passing siding unless authorized by train order.

I.—Double track. Robbins to Gregg.

N.—Symbols—

a.—Regular stop. — e—Eastward.
l.—Stop on signal. — w—Westward.
p.—Passing siding. — W—Water tank.
c.—Center passing siding. — t—Turntable.
o.—Other tracks. — y—"Y" tracks.

Figures in small circle opposite station name indicate speed limits through city or town. Where limits for passenger and freight trains are different upper figure indicates passenger train and lower figure, freight train speed limits.

R.—Employes are forbidden to stand on the track and board an approaching engine or car, or to ride on front end of engines not equipped with steps.

S.—When an engine is to be detached from train on grades a sufficient number of hand brakes must be set to hold train. Air brakes must not be depended upon to hold train after engine is detached.

T.—Before starting down any grade where the use of retaining valves will be necessary, the engineman will designate how many retainers to turn up, and it will be the duty of the conductor to see that the proper number, as designated by the engineman, are turned up, and that they are turned down at the proper point.

On grades of one and one-half per cent or more, all retainers must be turned up, unless otherwise provided, and on grades less than one and one-half per cent the engineman will designate how many to turn up.

If, in the judgment of the Conductor, more retainers will be needed to properly control train, he will turn them up, and notify engineman.

If the engineman or conductor thinks it necessary because of condition of brakes or any other cause to use retainers on any grade where it is not the general practice to use them, he will stop the train at the proper point and arrange accordingly.

U.—Engines or cars standing on descending grades or on spur tracks must not be coupled to until it is known that the engines or cars to be coupled to are secured by brakes or otherwise.

V.—When trains are running against the current of traffic at night, a yellow light, instead of red will be displayed to the rear from the marker on the side next to the opposing track.

W.—Electric headlight should be dimmed when the glare would endanger persons, such as: on entering yards; approaching passenger stations when passengers are getting on or off trains; telegraph offices where orders or messages are likely to be handed on; approaching passenger train on opposite track and when stock is noticed on track. (Also read Rule 17.)

X.—When a flagman protecting a passenger train or protecting against a passenger train is recalled, he must first place a lighted fusee on the track, in addition to placing two torpedoes on the rail, this rule to apply both day and night.

Y.—Torpedoes are supplementary signals. The explosion of two not more than 200 feet apart is a signal to reduce speed and look out for stop signal. Explosion of one torpedo will indicate same as two, but the use of two is required. (This supersedes Rule 15, Book of Rules.)

Z.—A train finding a fusee burning on or near its track must stop and extinguish the fusee, and then proceed with caution prepared to stop short of train or obstruction. (This supersedes Rule 11, Book of Rules.)

A.A.—When a train is on a siding to meet or be passed by another train, after the switch is properly set for the expected train, employes must locate themselves at least 20 feet from the main line switch until after the expected train has cleared the clearance point at that switch. The same rule applies to employes of a train on the main line when the switch is properly set for the expected train to enter the siding.

A.B.—Location and length of turntables:

Parsons, O. ..... 100 feet Joint H. V.

A.C.—Location of "Y" tracks, length of tail tracks:

Gregg, O. ..... 100 feet
Resick, O. ..... Any

A.D.—(a) On dou… tion signals.
(b) On single… in both dire… both directio…
(c) On single… one directio… direction on…
(d) On Coal … uled, in eit… signals in e…
(This supersed…

Northern Division … table between … rules of the No… tion and Valley …
Westward trains … order or a clea…
While taking coal … open.
Limeville helper … between Limevi… regular and ext…
Engines handling … uncoupled from …

STAT…

Minford, O. ….
Waverly, O. ….
Stockdale, O. ….
Kingston, O. ….
Sciotoville, O. ….
Circleville, O. ….
Ashville, O. ….
Chillicothe, O. ….
Columbus, O. ….
Columbus, O. ….

NATI DIVISION.

& FREESTONE BRANCH. **EASTWARD**

TIME TABLE No. 115. In Effect Sunday, May 4, 1924. STATIONS.	SECOND CLASS. 128 Daily Ex. Sun.	Side Track Capacity in Cars. (45 ft.)
	Ar AM	
CARTER	11 10	o 13
0.8		
Rock Crusher	11 05	Yard
1.1		
Poplar	f11 00	o 2
1.9		
Smith Creek	f10 40	o 4
0.9		
Deep Cut	f10 20	o 2
1.2		
Trace	f10 00	o 7
1.3		
Buggies	f 9 45	o 3
4.3		
Tannery	f 9 20	o 39
2.9		
Sullivan	f 9 05	o 7
1.2		
Bruce	f 8 53	o 8
4.0		
GARRISON	8 40 Lv AM	o129
	128 Daily Ex. Sun.	

WESTWARD **NORTHERN DIVISION** **EASTWARD**

Calls	Hours Open	Distance from Limeville	FOURTH CLASS. 75 Daily	FOURTH CLASS. 73 Daily	FOURTH CLASS. 71 Daily	THIRD CLASS. 95 Daily	THIRD CLASS. 99 Daily	TIME TABLE No. 115. In Effect Sunday May 4, 1924. STATIONS.	THIRD CLASS. 98 Daily	THIRD CLASS. 92 Daily	Side Track Capacity Cars. (45 ft.)
			Lv PM	Lv PM	Lv AM	Lv PM	Lv AM		Ar PM	Ar AM	
MV	Continuous	.0	11 20	8 00	6 00	1 00	3 45	**LIMEVILLE**	2 20	5 20	
.....	.....	4.0	11 40	8 25	6 25	1 50 98	4 10	4.0 **Sciotoville**	1 50 98	4 50	p 117
WR	Continuous	9.4	12 15	9 00	7 00	2 15	4 45 93	W 5.4 **Wheeler**	1 20	4 45 99	p 121
.....	.....	13.1	12 35	9 20	7 20	2 35	5 05	3.7 **Marshall**	1 00	4 00	p 101
.....	.....	17.8	1 00	9 45	7 45	2 55	5 30	4.7 **County Line**	12 35	3 35	p 106
X	Continuous	21.4	1 23	10 05	8 05	3 15	5 50	3.6 **Apex**	12 15	3 15	p 108
RB	Continuous	24.2	1 50	10 30	8 30	3 40	6 15	W 2.8 **Robbins** (E.E.D.T.)	11 50	2 50	
G	Continuous	28.2	2 20 92	11 00	9 00	4 05	6 45	Wy 4.0 **Gregg** (W.E.D.T.)	11 20	2 20 75	
.....	.....	30.6	2 40	11 20	9 20	4 25	7 05	3.2 **N. & W. CONNECTION**	11 00	2 00	.....
SX	Continuous	31.2	.....	.....	.....	.....	.....	0.6 **Glen Jean**	.....	.....	.....
SK	Continuous	92.5	7 00	3 40	1 40	8 45	11 25	61.3 **Valley Crossing**	7 20	10 20	Yard
PA	Continuous	95.4	7 20 Ar AM	4 00 Ar AM	2 00 Ar PM	9 00 Ar PM	11 45 Ar AM	2.9 Wt **ARSONS**	7 00 Lv AM	10 00 Lv PM	Yard
			75 Daily	73 Daily	71 Daily	95 Daily	99 Daily		98 Daily	92 Daily	

NORTHERN DIVISION.

TIONS.

superior to Westward trains

e right-hand track, and will ss, unless under protection. eneral Instructions F).

ices at Russell and Parsons. ks located at Russell, Gregg

ds and Gauntlets, passenger eight trains to 10 miles per ps to insure ability to stop

Limit" boards, all trains 10

without cars, 12 miles per

f Cincinnati Division and Division. Northern Division and D. ailroad. Northern Division and N. way. (Interlocked.)

the opposite running track ks. — will use the ———— the right over all ————

cts the other track, unless protected as prescribed by track.

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G.—Fourth class trains will not require train orders to run ahead of third class trains. Extra trains will not require train orders to run ahead of third and fourth class trains.

H.—When required to take siding, a train will enter at first switch of the passing siding. An eastward train will not use a westward nor a westward train an eastward passing siding unless authorized by train order.

I.—Double track. Robbins to Gregg.

N.—Symbols—

a—Regular stop.	e—Eastward.
b—Stop on signal.	w—Westward.
p—Passing siding.	W—Water tank.
c—Center passing siding.	t—Turntable.
o—Other tracks.	y—"Y" tracks.

Figures in small circle opposite station name indicate speed limits through city or town. Where limits for passenger and freight trains are different upper figure indicates passenger train and lower figure, freight train speed limits.

R.—Employes are forbidden to stand on the track and board an approaching engine or car, or to ride on front end of engines not equipped with steps.

S.—When an engine is to be detached from train on grades a sufficient number of hand brakes must be set to hold train. Air brakes must not be depended upon to hold train after engine is detached.

T.—Before starting down any grade where the use of retaining valves will be necessary, the engineman will designate how many retainers to turn up, and it will be the duty of the conductor to see that the proper number, as designated by the engineman, are turned up, and that they are turned down at the proper point.

On grades of one and one-half per cent or more, all retainers must be turned up, unless otherwise provided, and on grades less than one and one-half per cent the engineman will designate how many to turn up.

If, in the judgment of the Conductor, more retainers will be needed to properly control train, he will turn them up, and notify engineman.

If the engineman or conductor thinks it necessary because of condition of brakes or any other cause to use retainers on any grade where it is not the general practice to use them, he will stop the train at the proper point and arrange accordingly.

U.—Engines or cars standing on descending grades or on spur tracks must not be coupled to until it is known that the engines or cars to be coupled to are secured by brakes or otherwise.

V.—When trains are running against the current of traffic at night, a yellow light, instead of red will be displayed to the rear from the marker on the side next to the opposing track.

W.—Electric headlight should be dimmed when the glare would endanger persons, such as: on entering yards; approaching passenger stations when passengers are getting on or off trains; telegraph offices where orders or messages are likely to be handed on; approaching passenger train on opposite track and when stock is noticed on track. (Also read Rule 17.)

X.—When a flagman protecting a passenger train or protecting against a passenger train is recalled, he must first place a lighted fusee on the track, in addition to placing two torpedoes on the rail; this rule to apply both day and night.

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Z.—A train finding a fusee burning on or near its track must stop and extinguish the fusee, and then proceed with caution prepared to stop short of train or obstruction. (This supersedes Rule 11, Book of Rules.)

A A.—When a train is on a siding to meet or be passed by another train, after the switch is properly set for the expected train, employes must locate themselves at least 20 feet from the main line switch until after the expected train has cleared the clearance point at that switch. The same rule applies to employes of a train on the main line when the switch is properly set for the expected train to enter the siding.

A B.—Location and length of turntables—
Parsons, O. ..... 100 feet Joint H. V.

A C.—Location of "Y" tracks, length of tail tracks—
Gregg, O. ..... 100 feet
Resick, O. ..... Any

A D.—(a) On double track districts, extras will not display classification signals.

(b) On single track districts, where freight trains are scheduled in both directions, extras will display classification signals in both directions.

(c) On single track districts, where freight trains are scheduled in one direction, extras will display classification signals in the direction only that freight trains are scheduled.

(d) On Coal Field Districts, where freight trains are not scheduled, in either direction, extras will not display classification signals in either direction.

(This supersedes that part of Rule 21 in conflict herewith.)

SPECIAL INSTRUCTIONS.

Northern Division trains will be governed by Cincinnati Division time-table between Russell and Limeville and by the time-table and rules of the Norfolk & Western Railway between N. & W. Connection and Valley Crossing.

Westward trains will not pass Gregg without receiving a "31" train order or a clearance card.

While taking coal at Robbins, the county road crossing must be kept open.

Limeville helper engine will work as an extra daily (day and night) between Limeville and Sciotoville and has right over all Westward regular and extra trains, Sciotoville to the cross over at Limeville.

Engines handling freight trains with 20 or more loaded cars must be uncoupled from train while taking coal or water.

SURGICAL STAFF.

STATION	SURGEON'S NAME.
Munford, O.	G. W. Fishbough.
Waverly, O.	O. C. Andre.
Stockdale, O.	E. M. Dixon.
Kingston, O.	C. C. Hatfield.
Sciotoville, O.	J. W. Hutchings.
Circleville, O.	Howard Jones.
Asheville, O.	J. O. Stout.
Chillicothe, O.	H. R. Brown.
Columbus, O.	L. L. Bigelow, Phone 13084.
Columbus, O.	R. O. Adams, 154 Sy[illegible]

CINCINNATI AND RUSSELL DIVISIONS.

GENERAL INSTRUCTIONS.

SINGLE TRACK.—Eastward trains are superior to Westward trains of the same class (see Rule 81).

DOUBLE TRACK.—Trains will run on the right-hand track and will not cross over to the left-hand track unless under protection (see Rules 99, 314 and 337 and General Instructions F).

A.—Standard clocks located in telegraph offices at Russell, Stevens Yard Office and Roundhouse, Covington Roundhouse and 4th St. and Central Union Stations, Cincinnati.

B.—Bulletin books and watch register blanks located in telegraph offices at Russell, Garrison, Maysville, Stevens Yard Office and Roundhouse, Covington Yard Office and Roundhouse and 4th St. and Central Union Stations, Cincinnati.

C.—Yard Limits Russell, Maysville, Stevens and Covington designated by "Yard Limit" Boards.

D.—Maximum Speed—

Approaching the ends of Double track and Gauntlets passenger trains must reduce speed to 20, freight trains to 10 miles per hour at a sufficient distance therefrom to insure ability to stop if necessary.

Passenger trains, 60 miles per hour; when handled by G-6, G-7, G-8 or G-9 engines, 40 miles per hour. Passenger and express trains handling box cars, 45 miles per hour. Manifest and stock trains 30 miles per hour. All other freight trains 20 miles per hour.

Through yards protected by "Yard Limit" boards, passenger trains 30, freight trains 10 miles per hour, except Nos. 1, 2, 3, 4, 5, and 6, 40 miles per hour, between M. S. Cabin and R. U. Cabin and between C. S. Cabin and K. C. Junction. Through Gauntlet at Vanceburg eastward passenger trains 20, eastward freight trains 10 miles per hour. Dayton Hill, between Brichhouse and Grave Yard, passenger trains 25 miles per hour; over all bridges between and including truss span, just east of Dayton to Cincinnati, all trains 15 miles per hour; over Crossing at K. C. Junction, all trains 10 miles per hour. Engines running backward, with or without cars, 15 miles per hour. Trains hauling Steam Wrecking Crane, 20 miles per hour.

KINNICONNICK AND FREESTONE BRANCH

All trains 15 miles per hour.

Engines running backward, with or without cars, 10 miles per hour. Trains hauling Steam Wrecking Crane, 10 miles per hour.

E.—Junctions and Crossings—

Riverton—	Crossing of E. K. Railway. Interlocked.
Limeville—	Junction to Northern Division.
Garrison—	Junction of Kinniconnick and Freestone Branch.
Maysville—	Junction of L. & N. Railroad (Paris Division.)
Wellsburg—	Junction of Brooksville Railroad.
Newport—	Crossing of L. & N. Railroad. Interlocked.
K. C. Junction—	Junction of L. & N. Railroad (K. C. Division.)

F.—A train running in opposite direction on double track will not enter block until advised in writing by signalman condition of block in advance.

When a train crosses over to, or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by Rule 99 in both directions on that track.

When necessary to divert a train to the opposite running track the train order should be worded: "No. — will use the ——— ward track———to———, and has right over all——— ward trains."

When from any cause an engine, under steam, is cut out of a train at a non-telegraph station, the train must stop at the next open telegraph office and report the circumstances to the train dispatcher. The engine cut out must not use a main track unless protected in accordance with Rule 99 or by train orders.

H.—When required to take siding, a train will enter at first switch of the passing siding.

An eastward train will not use a westward nor a westward train an eastward passing siding unless authorized by train order.

I.—Double Track—
Russell to Cincinnati.

J.—Rules governing the movement of trains with the current of traffic on Double Track by means of Block Signals:

Between Russell and Cincinnati, trains will run with the current of traffic and will be governed by Automatic Electric Block Signals and Interlocked Block Signals, the indications of which will supersede Time Table superiority.

The Automatic Signals will be designated by a number on the pole, conforming to mile post, and by diamond pointed semaphore arms, which will work in the upper right hand quadrant.

When an automatic signal is displayed at "stop," a train will stop, then proceed with caution, looking out for train ahead, car on siding fouling main track, misplaced switch or broken rail, regulating speed so that train can be stopped within scope of Engineman's view.

Automatic Signals between Russell and Riverton and between Brent and Cincinnati are Three positions signals whose indications are as follows: Blade horizontal, or red, stop and proceed with caution, diagonal, or Yellow, proceed with caution; perpendicular, or Green, proceed, block clear.

The signal poles governing the movement on Westward track between Brent and Sixth Street, Dayton, are equipped with letter "G," illuminated day and night. ONLY FREIGHT TRAINS, consisting of 25 or more cars will be governed by this signal (G) as follows: When Automatic Signal, equipped with letter "G" is at "stop," trains will proceed with caution, looking out for train ahead, regulating speed so that train can be stopped within scope of engineman's view.

Interlocked signals have square end semaphore arms; when displayed at "stop," train will wait until signal is cleared unless otherwise authorized to proceed.

The movement of trains will be supervised by the Train Dispatcher, who will issue instructions to signalman when required.

A train having work to do which may detain it more than 20 minutes, must obtain permission from the Signalmen at the last station at which there is a siding before entering the block in which work is to be done. The signalman must obtain authority to give this permission from the Train Dispatcher.

Except as affected by these rules, all Block Signals and Train Rules remain in force.

Signalmen will not display clear signals for inferior trains on the time of or within 20 minutes of the time of superior trains, without authority from the Train Dispatcher.

When signals are displayed at "stop" and a superior train following is due within 20 minutes, trains will clear the block as quickly as practicable.

Hand or lamp signals from signalman will be authority for trains running with current of traffic to pass fixed signals at 'stop' when necessary to enter siding or cross-over and when switches are seen to be right and track clear.

K.—Trains may be started without orders and will run as extras: Westward from Russell. Eastward from Stevens.

M.—Local freight trains will stop on signal at all stations to do work.

N.—Symbols—s—Regular stop.

l—Stop on signal.	o—Other tracks.	W—Water tank.
w—Westward.	p—Passing siding.	t—Turntable
e—Eastward	c—Center passing siding.	y—"Y" track.

Figures in small circle opposite station name indicate speed limits through city or town. When limits for passenger and freight trains are different, upper figure indicates passenger train, and lower figure freight train speed limits.

O.—Agents will not sell tickets to points at which train is not authorized to stop.

P.—When a train running on double track is stopped suddenly, trains running in opposite direction must be held until it is ascertained whether or not the opposing main track is obstructed.

R.—Employes are forbidden to stand on the track and board an approaching engine or car, or to ride on front end of engines not equipped with steps.

S.—When an engine is to be detached from train on grades, a sufficient number of hand brakes must be set to hold train. Air brakes must not be depended upon to hold train after engine is detached.

T.—Before starting down any grade where the use of retaining valves will be necessary, the engineman will designate how many retainers to turn up, and it will be the duty of the conductor to see that the proper number, as designated by the engineman, are turned up, and that they are turned down at the proper point.

On grades of one and one-half per cent. or more, all retainers must be turned up, unless otherwise provided, and on grades less than one and one-half per cent the engineman will designate how many to turn up.

If in the judgment of the conductor more retainers will be needed to properly control train, he will turn them up and notify the engineman.

If the engineman or conductor thinks it necessary because of condition of brakes or any other cause to use retainers on any grade where it is [illegible] stop the train at the [illegible]

U.—Engines or cars stand[ing] must not be coupled [illegible] to be coupled to, [illegible]

V.—When trains are run[ning] a yellow light, instead [of] the marker on the [left]

W.—Electric headlight sh[all] danger persons, sup[ply] passenger stations [and] Telegraph Offices [will] handed on; approach[ing] when stock is noticed [on]

X.—When a flagman p[ro]tects against a passenger [train] fuse on the track, [or] rail; this rule to app[ly]

Y—Torpedoes are supplemented more than 200 feet [apart] out for stop signal. [Use] as two, but the use [of] Book of Rules.)

Z.—A train finding a fus[e] and extinguish the [fire] pared to stop short [of] Rule 11, Book of R[ules]

A.A.—When a train is on [a] train, after the switch employes must locate [the] line switch until after [the] ance point at that [time] of a train on the main [track] the expected train to [arrive]

A.B.—Location and length [of] Russell . . . . . 100 [feet] Maysville . . . . . 70 [feet]

A.C.—Location of "Y" track[s]
Russell . . . . . [illegible]
Carter . . . . . [illegible]
Garrison . . . . . [illegible]

A.D.—(a) On double track [sec]tion signals.

(b) On single track [with] both directions, extra [trains] directions.

(c) On single track [with] in one direction, extra [trains] direction only that [time]

(d) On Coal Field Dou[ble] uled, in either direction [on] nals in either direction [on]

(This supersedes that [page]

GENERAL INSTRUCTIONS.

to Westward trains

-hand track and will
ion under protection
structions F).

at Russell, Stevens
ndhouse and 4th St.

located in telegraph
ens Yard Office and
ndhouse and 4th St.

Covington designated

Gauntlets passenger
ains to 10 miles per
assure ability to stop

nodled by G-6, G-7,
assenger and express
Manifest and stock
trains 20 miles per

boards, passenger
except Nos. 1, 2, 3, 4,
K. Cabin and R. U.
Junction. Through
trains 30, eastward
Hill, between Brich-
miles per hour; over
just east of Dayton
; over Crossing at
. Engines running
hour. Trains haul-
hour.

BRANCH

cars, 10 miles per
10 miles per hour.

Interlocked.
Pressmore Branch
(Paris Division.)
Interlocked.
(K. C. Division.)

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On grades of one and one-half per cent. or more, all retainers must be turned up, unless otherwise provided, and on grades less than one and one-half per cent the engineman will designate how many to turn up.

If in the judgment of the conductor more retainers will be needed to properly control train, he will turn them up and notify the engineman.

If the engineman or conductor thinks it necessary because of condition of brakes or any other cause to use retainers on any grade where it is not the general practice to use them, he will stop the train at the proper point and arrange accordingly.

U.—Engines or cars standing on descending grades or on spur tracks must not be coupled to until it is known that the engine or cars to be coupled to, are secured by brakes or otherwise.

V.—When trains are running against the current of traffic at night a yellow light, instead of red, will be displayed to the rear from the marker on the side next to the opposing track.

W.—Electric headlight should be dimmed when the glare would endanger persons, such as: on or entering yards; approaching passenger stations when passengers are getting on or off trains; Telegraph Offices where orders or messages are likely to be handed on; approaching passenger train on opposite track and when stock is noticed on track. (Also read Rule 17.)

X.—When a flagman protecting a passenger train or protecting against a passenger train is recalled he must place a lighted fusee on the track, in addition to placing two torpedoes on the rail; this rule to apply both day and night.

Y—Torpedoes are supplementary signals. The explosion of two not more than 300 feet apart is a signal to reduce speed and to look out for stop signal. Explosion of one torpedo will indicate same as two, but the use of two is required. (This supersedes Rule 15, Book of Rules.)

Z.—A train finding a fusee burning on or near its track must stop and extinguish the fusee, and then proceed with caution prepared to stop short of train or obstruction. (This Supersedes Rule 11, Book of Rules.)

A.A.—When a train is on a siding to meet or be passed by another train, after the switch is properly set for the expected train, employes must locate themselves at least 20 feet from the main line switch until after the expected train has cleared the clearance point at that switch. The same rule applies to employes of a train on the main line when the switch is properly set for the expected train to enter the siding.

A.B.—Location and length of Turntables:

Russell	100 feet	Stevens	100 feet
Maysville	70 feet	Covington	70 feet

A.C.—Location of "Y" tracks, length of tail track:

Russell	150 feet
Carter	107 feet
Garrison	Any

A.D.—(a) On double track districts, extras will not display classification signals.

(b) On single track districts, where freight trains are scheduled in both directions, extras will display classification signals in both directions.

(c) On single track districts, where freight trains are scheduled in one direction, extras will display classification signals in the direction only that freight trains are scheduled.

(d) On Coal Field Districts, where freight trains are not scheduled, in either direction, extras will not display classification signals in either direction.

(This supersedes that part of Rule 21 in conflict herewith.

CINCINNATI AND RUSSELL DIVISIONS.

SPECIAL INSTRUCTIONS.

7, 16 and 17.
7, 8, 18 and 19.
7, 8, 16 and 17.
7, 8 and 16.
7, 8, 16 and 17.
7, 16 and 17.
7, 8, 16 and 17.

Flag Stops—

Irwin	17, 16 and 17.
Sand Hill	16 and 17.
Poplar St., Maysville	17, 16 and 17.
Amanda	118 and 19.
Brookens	
Higginsport	17, 8, 18 and 19.
Upper St., Augusta	118 and 19.
Rock Springs	17, 18 and 19.
Brooksville Junction	17, 8 and 19.
Bradford	17, 8, 18 and 19.
Willow Grove	17, 18 and 19.
Carrytown	17, 8, 18 and 19.
Lyra	
Mentor	
Bangs	118 and 19.
California	17, 8, 18 and 19.
Oneonta	
Ross	
Melbourne	
Brent	
Altamont	

Flag Stops—

Water Works	17, 18 and 19.
Bellevue	17, 8, 18 and 19.
Wright	1127 and 128.
Becket	
Red Brush	

No. 3.—Greenup and Vanceburg, to receive passengers holding tickets to Cincinnati or beyond.

No. 4.—Greenup to discharge passengers holding tickets from Newport or beyond.

No. 5.—Greenup and Trinity to receive passengers holding tickets to Newport or beyond.

Nos. 4 and 5.—Augusta, Sunday only—to receive and discharge passengers holding tickets to or from Ashland, Newport or beyond.

No. 7.—Ausanba, Saturdays only.

No. 8.—Ausanba, Mondays only.

Trains 1, 2, 3, 4, 5, 6 and 8, use Central Union Station, Cincinnati; Trains 7, 18, 19, 101 and 106, use 4th Street Station, Cincinnati.

Cincinnati Division trains will be governed by Huntington Division time table between Russell and Huntington and by time table of C. & C. K. R. R. & T. & B. Co. between K. C. Junction and Cincinnati.

Gauntlet is operated over Salt Lick Creek Bridge at Vanceburg.

Engines handling freight trains with 20 or more loaded cars must be uncoupled from train while taking coal or water.

SURGICAL STAFF.

STATION.	NAME.	OFFICE ADDRESS.	TELEPHONE CALL.
Altamont	J. H. Hohnstedt	21 Mt. Pleasant Ave.	Highland 370.
Stevens	A. L. Beckett	Stevens.	
Ironton O.	W. F. Marting	311 South 5th Street.	111.
Ironton O.	H. S. Allen	305 So. 5th Street.	707.
Russell, Ky.	J. L. Rathbone		685R.
Russell, Ky.	J. A. Franz	Russell, Ky.	
Greenup, Ky.	A. S. Brady		34 and 38.
Greenup, Ky.	H. T. Morris		
Fullerton, Ky.	A. P. Hunt		33.
Fullerton, Ky.	W. M. Meadows	Fullerton, Ky.	
Portsmouth, O.	T. G. McCormick		441X.
Vanceburg, Ky.	J. D. Liles		93.
Concord, Ky.	D. W. Trippett	Concord, Ky.	
Maysville, Ky.	A. O. Taylor	3rd Street.	36.
	W. S. Yazell	210 Sutton Street.	45.
Dover, Ky.	F. M. Smith		
Dover, Ky.	J. H. Hutchins		303.
Augusta, Ky.	J. G. Norris		
Dayton, Ky.	S. P. Garrison		South 3039.
Newport, Ky.	C. F. Wamsley	3rd St. and Overton Ave.	South 242.
Covington, Ky.	O. L. Reynolds	115 West 4th Street.	South 3066.
Cincinnati, O.	Walter R. Grise	19 W. 7th Street.	Canal 693.
Cincinnati, O.	E. R. Twatchman	Union Trust B'ldg.	Main 870.
Cincinnati, O.	J. F. Rogers	3603 Harrison Ave.	
Cincinnati, O.	J. C. Williams	3603 Harrison Ave.	

CINCINNATI AND NORTHERN DIVISIONS.

D. T. EVANS,	Train Master	Stevens, Ky.
H. N. WALTERS,	Assistant Train Master	Covington, Ky.
H. E. DAVIS,	Assistant Train Master	Parsons, O.
W. W. SHELTON,	Road Foreman of Engines	Stevens, Ky.
O. W. LLOYD,	Assistant Road Foreman of Engines	Stevens, Ky.
W. J. NEAL,	Train Master, Cincinnati Terminal	Covington, Ky.
O. R. CREIGHTON,	Assistant Train Master	Covington, Ky.
J. A. HARRELL,	Assistant Train Master	Chevlot, O.
E. H. EDSALL,	Chief Train Dispatcher	Covington, Ky.
B. V. DAVIS,	Division Engineer	Covington, Ky.
E. G. ESHELMAN,	Assistant Train Master	Stevens, Ky.
W. M. PITE,	Assistant Road Foreman of Engines	Russell, Ky.

RUSSELL DIVISION.

C. H. SNEDEGAR,	Assistant Superintendent	Russell, Ky.
J. C. DODGION,	Terminal Train Master	Russell, Ky.
J. E. CARY, JR.,	Assistant Train Master and Asst. R. F. of E.	Russell, Ky.
C. A. MILEM,	Assistant Train Master and Asst. R. F. of E.	Russell, Ky.
E. H. EDSALL,	Chief Train Dispatcher	Covington, Ky.

CINCINNATI AND RUSSELL DIVISIONS.

6

Regular stops—
- Margret St., Maysville ..... o7, 16 and 17.
- Wahlsburg .. .. } o7, 8, 18 and 19.
- Dayton .. .. }

Flag Stops—
- Chineville .. .. }
- Westland .. .. }
- Oliver .. .. }
- Grays Branch ..... }
- Edgington .. .. } 07, 8, 16 and 17.
- Simon .. .. }
- Frost .. .. }
- Taylors .. .. }
- Fullerton .. .. }
- Kirkville .. .. 07, 8 and 16.
- Five Brick ..... }
- St. Paul ..... }
- Quincy .. .. } 07, 8, 16 and 17.
- Buena Vista ..... }
- Rome .. .. }
- Carrs .. .. }
- Chalkley .. .. 07, 16 and 17.
- Peace .. .. 07, 8, 16 and 17.

Flag Stops—
- Irvin .. .. 07, 16 and 17.
- Sand Hill ..... f16 and 17.
- Poplar St., Maysville ..... 07, 16 and 17.
- Ansanba .. .. }
- Brookston .. .. } f18 and 19.
- Higginport .. .. 07, 8, 18 and 19.
- Upper St., Augusta ..... f18 and 19.
- Rock Springs ..... 07, 18 and 19.
- Brookville Junction ..... 07, 8 and 19.
- Bradford .. .. 07, 8, 18 and 19.
- Willow Grove ..... 07, 18 and 19.
- Carstown .. .. }
- Iyer .. .. } 07, 8, 18 and 19.
- Hester .. .. }
- Beagle .. .. f18 and 19.
- California .. .. }
- Oneonta .. .. }
- Ross .. .. } 07, 8, 18 and 19.
- Melbourne .. .. }
- Brent .. .. }
- Altamont .. .. }

Flag Stops—
- Water Works ..... 07, 18 and 19.
- Bellevue .. .. 07, 8, 18 and 19.
- Wright .. .. }
- Beckett .. .. } f127 and 128.
- Red Brush ..... }

No. 3.—Greenup and Vanceburg, to receive passengers holding tickets to Cincinnati or beyond.

No. 4.—Greenup to discharge passengers holding tickets from Newport or beyond.

No. 5.—Greenup and Trinity to receive passengers holding tickets to Newport or beyond.

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No. 8.—Ansanba, Mon

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Trains 7, 18, 19,

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	W. S. Yazell	210 Sutton Street.	45.
Dover, Ky.	F. M. Smith		
Dover, Ky.	J. H. Hutchins		363.
Augusta, Ky.	J. G. Norris		
Dayton, Ky.	S. P. Garrison		South 3038.
Newport, Ky.	C. F. Wamsley	3rd St. and Overton Ave.	South 343.
Covington, Ky.	O. L. Reynolds	115 West 4th Street.	South 5046.
Cincinnati, O.	Walter R. Gries	19 W. 7th Street.	Canal 883.
Cincinnati, O.	E. R. Twatchman	Union Trust B'ldg.	Main 870.
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W. J. NEAL,	Train Master, Cincinnati Terminal	Covington, Ky.
G. R. CREIGHTON,	Assistant Train Master	Covington, Ky.
J. A. MARKLL,	Assistant Train Master	Cheviot, O.
R. H. EDSALL,	Chief Train Dispatcher	Covington, Ky.
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R. G. ESHELMAN,	Assistant Train Master	Stevens, Ky.
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C. A. MILEM,	Assistant Train Master and Asst. R. F. of E.	Russell, Ky.
R. H. EDSALL,	Chief Train Dispatcher	Covington, Ky.

[fol. 54] PLAINTIFF'S EXHIBIT NO. 3

COMMONWEALTH OF KENTUCKY, set:

KENTON COUNTY COURT

Regular Term 26 day of August 1924, Katherine Linstead the Executrix nominated by the last Will and Testament of John A. Linstead deceased, this day came into Court, and agreed to take the execution thereof, and thereupon she took the oath prescribed by law, and in accordance with the provisions of said Will no bond is required; therefore the Court grants Certificate of Probate and Letters testamentary of Administration to her in due form.

A copy. Attest: John W. Middendorf, Clerk, by ——, D. C.

(Here follows Plaintiff's Exhibit No. 4, marked side folio pages 55, 56, 56a, 56b, 56c, and 56d.)

[fol. 57] Appearance of Counsel, filed March 15, 1926—omitted in printing.

Minute entry of argument and submission October 14, 1926, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed November 5, 1926

Error to the District Court of the United States for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court in this cause be and the same is hereby reversed with costs and the cause remanded to the said District Court with directions to award a new trial.

[fol. 58] In United States Circuit Court of Appeals

Opinion—Filed November 9, 1926

Before Denison, Donahue and Moorman, Circuit Judges

Per Curiam:

We are unable effectively to distinguish the facts of this case from those of Hull v. Philadelphia, etc., Ry., 252 U. S. 475,—an opinion which apparently was not brought to the attention of the trial court. It thus becomes necessary to reverse the judgment and remand for further proceedings. We express no opinion as to whether an amendment pursuant to the rule of the Kinney case, 260 U. S. 340, can be allowed in the trial court if now desired.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] In Supreme Court of the United States

Order Allowing Certiorari—Filed March 14, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

JAN 28 1927
WM. R. STANSBURY
CLERK

Case No. [redacted] 171

Supreme Court of the United States

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased.
Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME.

JOHN W. COWELL,
Attorney for Petitioner.

COURT INDEX PRESS, 414-20 MAIN, CINCINNATI : : JANUARY, 1927

INDEX

	PAGE
Petition For Writ of Certiorari and Brief in Support of Same	1
Brief	2

LIST OF AUTHORITIES

Corpus Juris, Vol. 21, on page 1228-1232	3
Fisher v. C. C. C. & St. L. RR., 169 Federal Report, page 965	5
Standard Oil Company v. Anderson, 212 U. S., 215	5
Woodrow Iron Co. v. Lindbauch, 276, Federal Reporter, page 1	5
Hardy v. Shedden Co., 78 Federal Reporter, page 610	5
Hull v. RR. Co., 252 U. S. page 450-475	6

Supreme Court of the United States

Case No. .....

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased.

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME.

The petitioner Katherine Linstead, Executrix of the Estate of John A. Linstead, deceased, respectfully shows to this Honorable Court:

That her husband, John A. Linstead, deceased, was a freight conductor for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company that he was killed through a rear end collision while riding in a caboose on the tracks of the Chesapeake & Ohio Railway Company between Stevens, Kentucky, and Dayton, Kentucky.

An action was commenced under the state statutes of Kentucky against The Chesapeake & Ohio Railway Company. When the case came on for trial, counsel for the defendant, in his opening statement, made the con-

tention that the plaintiff had no case under the Kentucky statutes but that the liability of the defendant, if any, was under the Federal Employers Liability Act, because John A. Linstead, at the time he was killed was working for the defendant and not the Big Four Ry. Co. who paid him his wages and was also engaged in interstate commerce, and therefore, could not maintain an action under the Kentucky Statutes.

Not wishing to take issue on this point, counsel for plaintiff agreed to it, and offered an amended petition. The defendant then maintained that it was not ready to go to trial under the Federal Employers Liability Act and asked for a continuance, which was granted. Instead of trying the case on the amended petition a new suit (this case) was filed under the Federal Employers Liability Act.

There was no dispute about the facts in this case. The defendant offered no evidence. The trial Court instructed the jury that under the facts, as proven John A. Linstead became an employe of The Chesapeake & Ohio Railway Company. The jury returned a verdict in the sum of $16,500.00 upon which verdict a judgment was rendered.

Respondent's contention in the Court of Appeals was that the action should have been under the State Statute instead of the Federal Act. On this contention alone the Court of Appeals set aside the verdict.

BRIEF.

Our contention is that the respondent when sued under the State Statute of Kentucky after setting up as a defense that the liability, if any, was under the Employers Liability Act, is now estopped to deny that

the liability is under the Federal Employers Liability Act and from asserting that the action should be under the State Statute.

Corpus Juris, Vol. 21, on page 1228.

> "A Claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the perjudice of the adverse party."

Corpus Juris, Vol. 21, on page 1232.

> "The rule has been applied also to inconsistent positions in respect of question of process, remedy, and parties."

Corpus Juris, Vol. 21, on page 1232.

> "Where a party successfully contends that the Court has jurisdiction of a cause, he cannot question such jurisdiction in subsequent proceedings. And on the other hand, where he successfully defends an action on the ground that the court is without jurisdiction he cannot in subsequent action or proceedings assume a position inconsistent therewith. However, it has been held that one who successfully asserts the validity of a decree of a foreign tribunal is not estopped to deny its validity in a subsequent action, the view being taken that the principle of equitable estoppel cannot be invoked to confer jurisdiction on a foreign tribunal."

It seems a travesty on justice to permit the defendant, when sued under the State Statute, to set up the defense, that the liability, if any, was under the Federal Act and when sued under the Federal Act to set up that liability, if any, was under the State Statute.

Nevertheless, that is just what the defendant is doing in this case. The statement of counsel for the defendant stating their defense to the jury was offered in evidence in this case part of said statement is as follows:

Pages 41 and 42 of the record.

> "There was an arrangement between the Chesapeake & Ohio and the Big Four by which they exchanged service. The C. & O. would do a service for the Big Four and the Big Four would do a similar service for the C. & O.; and it is our contention that by reason of the work going on Mr. Linstead at that time was an employe of the C. & O. engaged in commerce for the C. & O. and aiding and assisting the C. & O. at that time in its interstate commerce.
>
> The Court: What bearing will that have on the case?
>
> Mr. Galvin: The action ought not to have been brought under the Kentucky Statute but under the Employers' Liability Act. That is a question that we think is for your Honor, and not for the jury."

We also contend that the case is rightfully brought under the Federal Employers Liability Act. The undisputed facts are that the decedent was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a freight conductor, that this railroad does not operate any lines or trains in the state of Kentucky, that he was sent into the State of Kentucky to Stevens, Kentucky to take charge of a train of cars which it was the duty of the respondent, the Chesapeake & Ohio Railroad Company, to deliver to the Big Four in Cincinnati. While on the tracks of the C. & O. Railroad Company he was doing their work under their supervision and control, furnished with their

time table and their rule books and took all instructions from them. They were his master and he was their servant. Therefore, by adoption, he became an employe of the C. & O. Railroad Company.

Fisher v. *C. C. C. & St. L. RR.*, 169 Federal Report, page 956.

In this case on a question involving taxation the Court held that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was not doing business in the State of Kentucky.

Standard Oil Company v. *Anderson*, 212 U. S., 215, lays down the following rule.

"To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power of control and directs the servants in the performance of their work."

Woodrow Iron Co. v. *Lindbauch*, 276, Federal Reporter, page 1, second syllabus.

"An agent employed may with his consent be hired by and employed to a third party for some special service so as to become as to that service an employe of such third party. If as to that service he becomes subject to the direction and control of such third party."

Hardy v. *Shedden Co.*, 78 Federal Reporter, page 610.

Third Paragraph. "Held, further, that plaintiff, though the general servant of defendant, was in this service the special servant of the Grand Army Post and it, and not defendant was liable as master for any negligence in the construction of the superstructure which he was to use in his work."

The respondent relies on the case of *Hull* v. *RR. Co.*, 252 U. S. page 450-475 which we content is easily distinguished from the case at bar. The facts in the Hull case are as follows:

The Western, Maryland Railway Company operated a line from Hagerstown, Maryland to Lurgan, Pennsylvania and the Philadelphia and Reading operated a line which exended from Lurgan, Pa. to Rutherford. The Western Maryland Railroad operated their trains clear through to Rutherford with their own crews and the Philadelphia & Reading Railroad operated their trains from Rutherford clear through to Hagerstown, Md. Each railroad operated their own trains one half the way over the line of the other railroad. John Hull, while working for the Western Maryland Railroad, was killed on that part of the road belonging to the Philadelphia & Reading Railroad and sued the Philadelphia & Reading Railroad. The verdict was directed in favor of the defendant, affirmed by the Court of Appeals and by the Supreme Court. In affirming the verdict the Court said.

> "It is clear that each company retained control of its own train crews, that what the latter did upon the line of the other was done as a part of their duty to the general employer."

In the case at bar, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, did not retain control of John A. Linstead after he went out of the state and into Kentucky on the tracks of the Chesapeake & Ohio Railroad. He was then under the exclusive and sole control of the Chesapeake & Ohio. Justice Clark wrote a dissenting opinion in the Hull Case because he was unable to find that each company retained control

of its employees and he used the following language.

> "Upon the contrary it seems to me that it is clear that neither company retained any control whatever over the crews of the line employed by it while on the lines of the other company."

Another distinguishing feature between the Hull case and the case at bar is that in the case at bar, John A. Linstead was doing the work of the Chesapeake & Ohio Railroad Company, it being their duty to deliver the cars to the Big Four at Cincinnati. In the Hull case each company operated their own trains over the tracks of the other and Hull was doing the work of the company which primarily employed him. We therefore contend that the Court of Appeals erred in reversing the judgment of the District Court.

We contend that the question involved is an important question of law. The decision of the Court of Appeals extends the doctrine in the Hull case and deprives, in this instance, a railroad man of the protection of the Federal Employers Liability law which was enacted for the protection of the railroad man while operating trains in interstate commerce.

In the Hull case, the road which primarily employed Hull would have been liable under the Federal Employers Liability Act but in this case the road employing John A. Linstead could not possibly be liable for his death. They had absolutely nothing at all to do with the operation of trains on the Chesapeake & Ohio road. In the Hull case the company primarily employing Hull operated their trains regularly over the tracks of the other road. The decision of the Court of Appeals

in this case means that under circumstances such as this a railroad man, although he may actively engaged in interstate commerce is deprived of the benefit of the Federal Employers Liability law enacted for his protection.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled The Chesapeake & Ohio Railway Company, vs Katherine Linstead, Executrix of the Estate of John A. Linstead, deceased, case No. 4626, to the end that the said case, may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

Katherine Linstead, Extrx. of
Estate John Linstead, Deceased.

JOHN W. COWELL,
Attorney for Petitioner.

No. 32427.

DEC 22 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1927

171

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased

Plaintiff in Error

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

John W. Cowell,
Attorney for Plaintiff in Error.

COURT INDEX PRESS, CINCINNATI, OHIO 11 DECEMBER, 1927

LIST OF AUTHORITIES

	Page
Corpus Juris, Vol. 21, on page 1228 1232	3
Fisher v. C. C. C. & St. L. RR., 169 Federal Report, page 965	5
Standard Oil Company v. Anderson, 212 U. S., 216	5
Woodrow Iron Co. v. Lindbauch, 276, Federal Reporter, page 1	5
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Hull v. RR. Co., 252 U. S. page 450 475	6

Supreme Court of the United States

October Term, 1927

171

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased.

Plaintiff in Error,

No. 32427. vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

Brief for Plaintiff in Error.

John A. Linstead, deceased, was a freight conductor for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. He was killed through a rear end collision while riding in a caboose on the tracks of the Chesapeake & Ohio Railway Company between Stevens, Kentucky, and Dayton, Kentucky.

An action was commenced under the state statutes of Kentucky against The Chesapeake & Ohio Railway Company. When the case came on for trial, counsel for the defendant, in his opening statement, made the contention that the plaintiff had no case under the Kentucky statutes but that the liability of the defendant,

if any, was under the Federal Employers Liability Act, because John A. Linstead, at the time he was killed was working for the defendant and not the Big Four Ry. Co. who paid him his wages and was also engaged in interstate commerce, and therefore, could not maintain an action under the Kentucky Statutes.

Not wishing to take issue on this point, counsel for plaintiff agreed to it, and offered an amended petition. The defendant then maintained that it was not ready to go to trial under the Federal Employers Liability Act and asked for a continuance, which was granted. Instead of trying the case on the amended petition a new suit (this case) was filed under the Federal Employers Liability Act.

There was no dispute about the facts in this case. The defendant offered no evidence. The trial Court instructed the jury that under the facts, as proven John A. Linstead became an employe of The Chesapeake & Ohio Railway Company. The jury returned a verdict in the sum of $16,[illegible] upon which verdict a judgment was rendered.

Respondent's contention in the Court of Appeals was that the action should have been under the State Statute instead of the Federal Act. On this contention alone the Court of Appeals set aside the verdict.

BRIEF.

Our contention is that the respondent when sued under the State Statute of Kentucky after setting up as a defense that the liability, if any, was under the Employers Liability Act, is now estopped to deny that the liability is under the Federal Employers Liability Act and from asserting that the action should be under the State Statute.

Corpus Juris, Vol. 21, on page 1228.

"A Claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the perjudice of the adverse party."

Corpus Juris, Vol. 21, on page 1232.

"The rule has been applied also to inconsistent positions in respect of question of process, remedy, and parties."

Corpus Juris, Vol. 21, on page 1232.

"Where a party successfully contends that the Court has jurisdiction of a cause, he cannot question such jurisdiction in subsequent proceedings. And on the other hand, where he successfully defends an action on the ground that the court is without jurisdiction he cannot in subsequent action or proceedings assume a position inconsistent therewith. However, it has been held that one who successfully asserts the validity of a decree of a foreign tribunal is not estoppel to deny its validity in a subsequent action, the view being taken that the principle of equitable estoppel cannot be invoked to confer jurisdiction on a foreign tribunal."

It seems a travesty on justice to permit the defendant, when sued under the State Statute, to set up the defense, that the liability, if any, was under the Federal Act and when sued under the Federal Act to set up that liability, if any, was under the State Statute. Nevertheless, that is just what the defendant is doing in this case. The statement of counsel for the defendant stating their defense to the jury was offered in evidence in this case part of said statement is as follows:

Pages 41 and 42 of the record.

> "There was an arrangement between the Chesapeake & Ohio and the Big Four by which they exchanged service. The C. & O. would do a service for the Big Four and the Big Four would do a similar service for the C. & O.; and it is our contention that by reason of the work going on Mr. Linstead at that time was an employe of the C. & O. engaged in commerce for the C. & O. and aiding and assisting the C. & O. at that time in its interstate commerce.
>
> The Court: What bearing will that have on the case?
>
> Mr. Galvin: The action ought not to have been brought under the Kentucky Statute but under the Employers' Liability Act. That is a question that we think is for your Honr, and not for the jury."

We also contend that the case is rightfully brought under the Federal Employers Liability Act. The undisputed facts are that the decedent was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a freight conductor, that this railroad does not operate any lines or trains in the state of Kentucky, that he was sent into the State of Kentucky to Stevens, Kentucky to take charge of a train of cars which it was the duty of the respondent, the Chesapeake & Ohio Railroad Company, to deliver to the Big Four in Cincinnati. While on the tracks of the C. & O. Railroad Company he was doing their work under their supervision and control, furnished with their time table and their rule books and took all instructions from them. They were his master and he was their servant. Therefore, by adoption, he became an employe of the C. & O. Railroad Company.

Fisher v. *C. C. C. & St. L. RR.*, 169 Federal Report, page 956.

In this case on a question involving taxation the Court held that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was not doing business in the State of Kentucky, when their crews were moving cars for the C. & O. R. R. in that state.

Standard Oil Company v. *Anderson*, 212 U. S., 215, lays down the following rule.

> "To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power of control and directs the servants in the performance of their work."

Woodrow Iron Co. v. *Lindbauch*, 276, Federal Reporter, page 1, second syllabus.

> "An agent employed may with his consent be hired by and employed to a third party for some special service so as to become as to that service an employe of such third party. If as to that service he becomes subject to the direction and control of such third party."

Hardy v. *Shedden Co.*, 78 Federal Reporter, page 610.

Third Paragraph. "Held, further, that plaintiff, though the general servant of defendant, was in this service the special servant of the Grand Army Post and it, and not defendant was liable as master for any negligence in the construction of the superstructure which he was to use in his work."

The respondent relies on the case of *Hull* v. *RR. Co.*, 252 U. S. page 450-475 which we content is easily distinguished from the case at bar. The facts in the Hull case are as follows:

The Western, Maryland Railway Company operated a line from Hagerstown, Maryland to Lurgan, Pennsylvania and the Philadelphia and Reading operated a line which extended from Lurgan, Pa. to Rutherford. The Western Maryland Railroad operated their trains clear through to Rutherford with their own crews and the Philadelphia & Reading Railroad operated their trains from Rutherford clear through to Hagerstown, Md. Each railroad operated their own trains one half the way over the line of the other railroad. John Hull, while working for the Western Maryland Railroad, was killed on that part of the road belonging to the Philadelphia & Reading Railroad and sued the Philadelphia & Reading Railroad. The verdict was directed in favor of the defendant, affirmed by the Court of Appeals and by the Supreme Court. In affirming the verdict the Court said.

> "It is clear that each company retained control of its own train crews, that what the latter did upon the line of the other was done as a part of their duty to the general employer."

In the case at bar, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, did not retain control of John A. Linstead after he went out of the state of Ohio and into Kentucky on the tracks of the Chesapeake & Ohio Railroad. He was then under the exclusive and sole control of the Chesapeake & Ohio, Page 37 of record. Justice Clark wrote a dissenting opinion in the Hull Case because he was unable to find that each company retained control of its employees and he used the following language.

> "Upon the contrary it seems to me that it is clear that neither company retained any control whatever over the crews of the line em-

ployed by it while on the lines of the other company."

Another distinguishing feature between the Hull case and the case at bar is that in the case at bar, John A. Linstead was doing the work of the Chesapeake & Ohio Railroad Company, it being their duty to deliver the cars to the Big Four at Cincinnati. In the Hull case each company operated their own trains over the tracks of the other and Hull was doing the work of the company which primarily employed him. We therefore contend that the Court of Appeals erred in reversing the judgment of the District Court.

We contend that the question involved is an important question of law. The decision of the Court of Appeals extends the doctrine in the Hull case and deprives, in this instance, a railroad man of the protection of the Federal Employers Liability act which was enacted for the protection of a railroad man while operating trains in interstate commerce.

In the Hull case, the road which primarily employed Hull would have been liable under the Federal Employers Liability Act because the Court found they retained control over him, but in this case the road employing John A. Linstead could not possibly be liable for his death. They had absolutely nothing at all to do with the operation of trains on the Chesapeake & Ohio road. In the Hull case the company primarily employing Hull operated their trains regularly over the tracks of the other road. The decision of the Court of Appeals in this case means that under circumstances such as this a railroad man, although he may actively be engaged in interstate commerce is deprived of the benefit of the Federal Employers Liability law enacted for his protection.

Wherefore, your petitioner respectfully prays that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court and the judgment of the trial court affirmed.

Katherine Linstead, Extrx, of
Estate John Linstead, Deceased.

John W. Cowell,
Attorney for Petitioner.

JAN 9 1928
CHARLES ELMORE CROPLEY
CLERK

No. 32427

Supreme Court of the United States

OCTOBER TERM, 1927

171

KATHERINE LINSTEAD, executrix of the Estate of John A. Linstead, deceased,

Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FRANK M. TRACY,
Attorney for Defendant in Error.

POINTS AND AUTHORITIES.

I.

Linstead was not an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act.

Hull v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475.
Wagner v. *C. & A. R. R. Co.*, 265 Ill. 250.
M. K. & T. Ry. Co. v. *West*, 134 Pac. 655.
M. K. & T. Ry. Co. v. *Blalack*, 147 S. W. 559.
Drago v. *Central R. R. Co.*, 106 Atl. 803.

II.

Defendant, The Chesapeake & Ohio Railway Co. is not estopped to contend that Linstead was not its employee.

McLaughlin v. *W. U. Tel. Co.*, 7 Fed. Rep. (2nd series) 177.
Davis v. *Walker*, 156 U. S. 689.
21 Corpus Juris, 1223.

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171

ATHERINE LINSTEAD, executrix of the Estate of John A. Linstead, deceased,

Plaintiff in Error,

vs.

E CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

---

ohn A. Linstead was a freight conductor in the service he Cleveland, Cincinnati, Chicago and St. Louis Rail- Company (commonly known and hereinafter referred s the "Big Four"). On the 15th day of August, 1924, he killed in a rear end collision while operating his "Big r" train on the lines of The Chesapeake & Ohio Rail- Company in Campbell County, Ky.

atherine Linstead, his administratrix, brought this on against The Chesapeake & Ohio Railway Company er the Federal Employers Liability Act, alleging that

her decedent was at the time of his death an employee of the Chesapeake & Ohio Railway Company in its interstate service. The defendant, The Chesapeake & Ohio Railway Company denied that Linstead was or ever had been in its employ.

The trial court held that under the circumstances shown, Linstead, though actually in the service of the "Big Four" was an employee of The Chesapeake & Ohio Railway Company within the meaning of the Employers Liability Act. The trial resulted in a verdict for plaintiff.

Defendant prosecuted error to the Circuit Court of Appeals for the Sixth Circuit, and that court reversed the trial court, handing down the following memorandum opinion.

> "We are unable effectively to distinguish the facts of this case from those of *Hull* v. *Philadelphia, etc., Ry.*, 252 U. S. 475—an opinion which apparently was not brought to the attention of the trial court. It thus becomes necessary to reverse the judgment and remand for further proceedings. We express no opinion as to whether an amendment pursuant to the rule of the *Kinney Case*, 260 U. S. 340, can be allowed in the trial court if now desired."

In this court, the petitioner, Katherine Linstead, administratrix, is contending—

First. That her decedent was an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act, and, therefore, the trial court was correct and the Court of Appeals in error in their respective rulings upon that question.

Second. That the defendant, The Chesapeake & Ohio Railway Company was and is estopped to contend that Linstead was not its employee by reason of an act of its counsel in the trial court.

I.

LINSTEAD WAS AN EMPLOYEE OF THE "BIG FOUR" RAILROAD.

The facts are all admitted. There was no issue of fact. The Chesapeake & Ohio Railway Company maintains its Cincinnati Terminal yards at Stevens, or Silver Grove, which is situated a short distance east of the town of Dayton in Campbell County, Kentucky. The Big Four has similar yards at Riverside, which is located just west of Cincinnati in the State of Ohio.

There is an unwritten reciprocal transfer arrangement between the two railroads. The Big Four sends its engines and crews to Stevens for cars for its Chicago division, and The Chesapeake & Ohio Railway Company, in turn, sends its engines and crews to Riverside for cars for The Chesapeake & Ohio Railway Company. They pay one another with service. No money is exchanged.

When The Chesapeake & Ohio Railway crews are on the lines of the Big Four they are under the control of the Big Four and vice versa when the Big Four crews are on The Chesapeake & Ohio Railway lines they are under the jurisdiction and control of The Chesapeake & Ohio Railway Company.

The Big Four crews are furnished with Chesapeake & Ohio Railway time tables, and books of rules, which they abide by, when on The Chesapeake & Ohio line, and they likewise get their instructions for the performance of their work from Chesapeake & Ohio Railway officials.

The Big Four crews perform no Chesapeake & Ohio work while on The Chesapeake & Ohio Railway lines. They handle nothing but Big Four business. They do not handle or break up Chesapeake & Ohio trains. The cars for the Big Four are prepared for the Big Four engines and crews by The Chesapeake & Ohio employees. A Big Four engine

will deliver a cut of Chesapeake & Ohio cars from the Riverside yards, and if a cut of Big Four cars is ready at Stevens, the Big Four engine and crew will take it back to Riverside, otherwise the engine and crew will go back "light."

The Big Four crews are hired and paid by the Big Four, which alone has the power or authority to reprimand or discharge them. The Chesapeake & Ohio Railway has nothing whatever to do with the contract of employment between the Big Four and its men. This identical arrangement exists insofar as The Chesapeake & Ohio trains and crews are concerned when on the Big Four lines.

On the occasion of the accident herein in question, Linstead was a Big Four freight conductor operating under the foregoing arrangement.

He had gotten a cut of Big Four cars at Stevens and was proceeding towards Cincinnati, riding in the caboose, when a Chesapeake & Ohio commuter ran into the caboose from the rear and killed him.

The question here presented has been definitely decided by this Court in the case of *Elizabeth Hull, administratrix*, v. *Philadelphia and Reading Railway Company*, 252 U. S. 475. This case is almost exactly parallel with the one at bar, and we think is conclusive of the question here presented. For the convenience of the court we quote at length from the opinion as follows:

> "The pertinent facts are not in dispute. John M. Hull at the time he was killed and for a long time before, was in the general employ of the Western Maryland Railway Company, an interstate carrier operating, among other lines, a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated

by defendant, the Philadelphia and Reading Railway Company, which extended from Lurgan to Rutherford, in the same state. Through freight trains were operated from Hagerstown to Rutherford over these two lines, and Hull was employed as a brakeman on such a train at the time he received the fatal injuries. On the previous day a crew employed by the Western Maryland Railway Company, and of which he was a member, had taken a train hauled by a Western Maryland engine from Hagerstown to Rutherford, and at the time in question, the same crew was returning with a train from Rutherford to Hagerstown. Before starting they received instructions from the yardmaster at Rutherford (an employee of the defendant company) as to the operation of the train, including directions to pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg, stopped there for the purpose of picking up the seven cars, and while this was being done, Hull was run over and killed by one of the defendant's locomotives.

The through freight service was conducted under a written agreement between the two railway companies which was introduced in evidence and constitutes the chief reliance of petitioner. Its provisions, so far as they need to be quoted, are as follows:

"2. Freight trains to run through between Hagerstown and Rutherford in both directions, and each company agrees to supply motive power in the above proportions (based upon mileage) so as to equalize the service performed.

4. Crews of each road to run through with their engines over the line of the other company.

5. Each company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour: * * * Time to begin at Rutherford and Hagerstown when crew is called for. * * * Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown.

6. The division of earnings of the traffic not to be disturbed or in any way affected by this arrangement.

7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five cents per engine to be made.

10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

16. Each company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs.

17. Each company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines.

18. All cases of violation of rules or other dereliction by the employees of one company while upon the road of the other shall be promptly investigated by the owning company, and the result reported to the employing company, with or without suggestions for disciplining, the employing company to report to the other the action taken.

19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

20. Employees of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one company to the other in all such matters.

21. The employees of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline, and orders of the owning company.'

We hardly need repeat the statement made in *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94, 59 L. ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress

used the words "employee" and "employed" in their natural sense and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Railway Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252."

As we have stated, the foregoing case appears to us to be decisive of the question here presented, and it is scarcely necessary to cite additional authority, but we desire to call the court's attention to the following cases, which are in accord with the ruling of this court in the Hull case.

Wagner v. *C. & A. R. R. Co.*, 265 Ill. 250.
M. K. & T. Ry. Co. v. *West*, 134 Pac. 655.
M. K. & T. Ry. Co. v. *Blalack*, 147 S. W. 559.
Drago v. *Central R. R. Co.*, 106 Atl. 803.

Counsel for Linstead say that the instant case is to be distinguished from the Hull case in two particulars.

First. That the Big Four did not retain control over Linstead after he went on the lines of The Chesapeake & Ohio Railway Company.

Second. Linstead when on the lines of The Chesapeake & Ohio Railway Company was doing the work of this company and not of the Big Four Company.

But there are no distinguishing facts. Linstead's service was for his own company, as was Hull's. In each case the employee is subject to the rules and regulations of the connecting carrier when on its lines, but, as said in the Hull case—

> "It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies."

II.

THE ALLEGED ESTOPPEL BY ACT OF COUNSEL.

The only thing appearing in the record bearing upon this matter is the following (page 39):

MAURICE L. GALVIN,

DIRECT EXAMINATION BY MR. COWELL.

> "My name is Maurice L. Galvin. I am an attorney at law. I represent The Chesapeake & Ohio Railway Company, the defendant in this action and have represented it for a long time.
>
> The court: What is it that you want to prove?

Mr. Cowell: I want to put in his opening statement in the other case.

Objection sustained; to which ruling of the court the plaintiff excepts.

The plaintiff then offered said statement, which is as follows:" (Then follows the statement.)

The statement which is inserted in the record purports to be the opening statement of counsel to a jury made by Mr. Galvin, the attorney for the Chesapeake & Ohio Railway Company some six months previously at a trial in another case then in progress.

In this purported statement, counsel appears to have said in substance that in that trial he would contend that under the circumstances which he expected the proof to disclose, that Linstead was an employee of the Chesapeake & Ohio Railway Co. within the meaning of the Federal Employers Liability Act.

The foregoing embraces everything in the record bearing upon petitioner's contention of an estoppel.

It does not even appear, except inferentially, that there was another case between the same parties. The pleadings in the other case are not in the record, nor are they referred to in the present case.

There was no attempt to plead an estoppel. There is no fact in the record that could constitute a basis for such a plea, unless it be the purported statement of counsel for defendant, to the introduction of which in evidence the trial court with manifest propriety sustained an objection.

But if we go outside of the record and supply all of the facts which counsel might perhaps have presented, we think there is still no basis whatsoever for an estoppel such as is contended for.

The facts are these:

The plaintiff brought two actions. The first was under the Kentucky Statute for wrongful death. In this action

the defendant answered by traversing all of the allegations of the petition and did not, as counsel contends in his brief, affirmatively plead that decedent was its employee.

When this case came on for trial a jury was impanneled, and the opening statements of counsel on both sides were made. We will assume that the statement of counsel for the defendant was the one which counsel for plaintiff has had incorporated in this record.

After these opening statements had been made, the trial court indicated an opinion that there was perhaps some merit in the statement of counsel for defendant that Linstead under the circumstances might be considered an employee of the Chesapeake & Ohio Railway Company. Whereupon, without asking for a ruling upon the matter, counsel for plaintiff asked leave to amend his petition and the case was thereupon continued to the next term.

The amended petition was never filed, but instead counsel for plaintiff filed an entirely new suit in which he alleged that Linstead was an employee of The Chesapeake & Ohio Railway Company at the time of his injury and death. The first suit was not dismissed but is still pending and undisposed of. There has never been an adjudication in that case upon the matter of Linstead's status as an employee.

The second action came on for trial. The court ruled that Linstead was under the circumstances an employee of the Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act and counsel for defendant reserved exceptions to the ruling.

It is under these circumstances that plaintiff's counsel is now insisting that defendant is estopped to contend that Linstead was not in its employ at the time of his injuries and death.

Needless to say, at the time of these proceedings neither counsel for plaintiff nor defendant knew of the ruling of this court in the case of *Hull* v. *Philadelphia, etc., Ry. Co.*, 252 U. S. 475.

Whatever may be said of an estoppel based upon an allegation of inconsistent facts, we are quite sure that it has never been held that an estoppel arises because of the position of Counsel taken on a question of law. 21 Corpus Juris, 1231-1234.

In the case at bar the facts set forth in the purported statement of counsel to the jury in the first case are substantially identical with those developed in the proof in the second case. Counsel for defendant did not misrepresent any fact, nor was opposing counsel misled as to anything. Indeed there was no controversy as to the facts relating to defendant's employment. The only difference was as to the legal effect of the admitted facts.

In *McLaughlin* v. *Western Union Telegraph Co.*, 7 Fed. Rep. (2nd series) 177, the court said:

> "Law is not an exact science, and there are many questions of law upon which a litigant may be doubtful as to his rights, and as to which he is entitled to a ruling of the court. I think a litigant has at all times a right to raise a doubtful question and may later take the contrary position as to the same law, at least until this question of law has been authoritatively decided by the court of last resort. * * * In my opinion there is a wide difference between judicial allegations of fact which operate as solemn admissions of the truth, which may not be known or provable by the other party, and judicial allegations on questions of law presenting to the court for decision a question of law equally well known to both parties. * * * In *Beerce* v. *Butchins*, 205 U. S. 240, the court said: 'It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a

title. *Van Winkle* v. *Crowell*, 146 U. S. 42, and therefore if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice and it can not be one because the party has no right to choose. The claim in the lien suit as was said in a recent case was not an election but an hypothesis. *Northern Assurance Co.* v. *Grandview Building Association*, 203 U. S. 106. The fact that a party through mistake attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt.'

This case shows that on a question of legal right one may assert at one time one proposition, for instance, in this case, a lien, and at another time another inconsistent proposition, for instance, a title, and that the mere assertion of a mistake on a question of law is not binding."

It has been held that where a party with knowledge of the facts assumes a certain position and *succeeds in it*, he thereafter will be estopped to assume a contrary position. *Davis* v. *Walker*, 156 U. S. 689, 21 Corpus Juris 1223. But in the instant case the defendant did not successfully maintain its position. The trial court was not asked to and did not in fact pass upon the question in the first case. Counsel for plaintiff voluntarily withdrew when the question was raised, and then brought the second suit.

We do not think any court anywhere has ever held that an estoppel arises under such circumstances.

We respectfully submit that Linstead was not an employee of The Chesapeake & Ohio Railway Company, and, therefore, had no cause of action under the Employers'

Liability Act, and this being true, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRANK M. TRACY,
Attorney for Defendant in Error.

MAURICE L. GALVIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1927.

Katherine Linstead, Executrix of the Estate of John A. Linstead, Deceased, vs. The Chesapeake & Ohio Railway Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 20, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was an action under the Federal Employers' Liability Act against the Chesapeake and Ohio Railway Company, of Virginia, by Katherine Linstead, as executrix, to recover damages for the death of her husband, who was a conductor in the employ of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the Big Four, but who was working upon a freight train running upon the Chesapeake & Ohio Railway Company's tracks between Stevens, Kentucky, and Riverside, Ohio, near Cincinnati. The question in the case is, for whom he was working when he was killed, whether for the Chesapeake & Ohio Railway Company, the respondent, or the Big Four Company. He was one of a train crew of the Big Four Company composed of an engineer, a conductor and two brakemen. The Chesapeake & Ohio Company comes from the east to Cincinnati along the southern bank of the Ohio River and crosses that river at Cincinnati. The Big Four Company has no line in Kentucky but receives traffic and business from the Chesapeake & Ohio Company at Cincinnati, or near thereto on the north side of the river, delivering the traffic to the northwest. The terminal yard, so called, of the Chesapeake & Ohio reaches from a station called Stevens, in Kentucky, for some twelve or thirteen miles to Riverside, near Cincinnati on the Ohio side, and in this twelve or thirteen miles the Chesapeake & Ohio line passes five stations, called Brent, Altamont, Newport Waterworks, Brick

House and Cold Haven, and over an Ohio River bridge. It is con
venient for both railroads in the interchange of traffic to make a
arrangement by which the Big Four lends to the Chesapeake &
Ohio a locomotive and caboose and a train crew to take the freigh
trains that come into Stevens, Kentucky, from the east to th
Big Four Company at Riverside, Ohio, over the rails of the Chesa
peake & Ohio. The Chesapeake & Ohio does not pay the Bi
Four Company any rental for the lending of its locomotive an
caboose and crew in this matter, but it pays the consideration by
reciprocal service rendered to the Big Four by a train crew an
locomotive and caboose of the Chesapeake & Ohio. When the Bi
Four train crew and locomotive and caboose run on the track of th
Chesapeake & Ohio between Stevens and Riverside, near Cincinnati
they are furnished with time-tables and rule books of the Chesa
peake & Ohio Railway. They are under the supervision and control
so far as their work is concerned, of the train master of the Chesa
peake & Ohio Company, whose jurisdiction reaches from Stevens t
Riverside in the operation of the Chesapeake & Ohio road. The Bi
Four crew is not subject to discharge by any officer of the Chesa
peake & Ohio road. In the operation of the train over the Chesa
peake & Ohio line, they obey the signals of the switch tenders o
that company and comply with the rules for operation on its line
The Big Four crew attends to nothing while on the Chesapeake &
Ohio line but the train which it is sent over to Stevens to bring t
the junction point at Riverside on the Ohio side. All of the mem
bers of the train crew, including the deceased, were paid by th
Big Four Company.

On the morning of the accident, Linstead, the deceased, a
conductor, had brought over his crew with the Big Four locomotive
and caboose to Stevens, had attached the locomotive and caboose t
a train of cars containing twenty-two loads and eighteen empties
and was proceeding to take them to Cincinnati and the junction with
the Big Four road. The train had proceeded only a few miles
on the Chesapeake & Ohio track when it was overtaken and run
into by a commutation passenger train of the Chesapeake & Ohio
Company running from Stevens to Cincinnati and back again. It
was a train operated by the Chesapeake & Ohio Railway for the
convenience of early morning passengers, and was not on the time
table. It was called the "Chippy". Linstead was in the caboose

at the rear of his freight train. The caboose was shattered to pieces and Linstead was killed.

The trial was had in the District Court in Kentucky, held at Covington, and in the charge the Court used this language, which was duly excepted to:

"First, under the evidence here, you are authorized to believe you couldn't find otherwise, that the Chesapeake and Ohio Railway is a common carrier engaged in interstate commerce, carrying freight and passengers between the states.

"Second, under the evidence you would be authorized to find, you couldn't find otherwise, that the defendant, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work."

The result of the trial was a verdict for $16,500, upon which judgment was entered.

By writ of error, the case was carried to the Circuit Court of Appeals. That Court, by *per curiam*, reversed the judgment and remanded the case for further proceedings. The language of the Court was:

"We are unable effectively to distinguish the facts of this case from those of *Hull* v. *Philadelphia, etc., Ry.*, 252 U. S. 475,—an opinion which apparently was not brought to the attention of the trial court."

The judgment of the Circuit Court of Appeals was brought here by certiorari. 273 U. S. 690. The legal consequences of the relation between one in the general service of another who is in the special service of a third person are set forth in the case of the *Standard Oil Company* v. *Anderson*, 212 U. S. 215, 221. In that case the plaintiff was employed as a longshoreman by a master stevedore, who under contract with the defendant was engaged in loading a ship. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered from a winch, and the question presented was whether the winchman whose negligence probably produced the injury was the servant of the owner of the ship or of the stevedore. After reference to the opinion of Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Metcalf, 49, this court said that the master was answerable for the wrongs of his servant, not because he

had authorized them nor because the servant in his negligen conduct represented the master, but because he was conductin the master's affairs, and the master was bound to see that h affairs were so conducted that others were not injured, and tha this principle rested on the great principle of social duty adopte from general considerations of policy and security. The opinio continues:

"The master's responsibility cannot be extended beyond th limits of the master's work. If the servant is doing his ow work or that of some other, the master is not answerable for h negligence in the performance of it.

"It sometimes happens that one wishes a certain work to b done for his benefit and neither has persons in his employ wh can do it nor is willing to take such persons into his general serv ice. He may then enter into an agreement with another b that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those me became *pro hac vice* the servants of him to whom they are fu nished. But, on the other hand, one may prefer to enter into a agreement with another that that other, for a consideration, sha himself perform the work through servants of his own selection retaining the direction and control of them. In the first case, h to whom the workmen are furnished is responsible for their negli gence in the conduct of the work, because the work is his work an they are for the time his workmen. In the second case, he wh agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the con duct of it, because, though it is done for the ultimate benefit o the other, it is still in its doing his own work. To determin whether a given case falls within the one class or the other we mus inquire whose is the work being performed, a question which i usually answered by ascertaining who has the power to contro and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coopera tion, where the work furnished is part of a larger undertaking."

Now the work which was being done here by Linestead and hi crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake and Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio

Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.

The case of *Hull* v. *Philadelphia & Reading Railway Company*, 252 U. S. 475, which controlled the view of the Circuit Court of Appeals, is to be distinguished from this. In that case, Hull, the plaintiff's deceased, was in the employ of the Western Maryland Railway Company as a brakeman and was killed. The Western Maryland Company was an interstate carrier operating a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated by the defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford in Pennsylvania. By arrangement between the two companies, through freight trains were operated from Hagerstown to Rutherford, one half over one line, and one-half over the other, and each company ran its own locomotives and freight trains over the united line from Hagerstown to Rutherford, observing the rules of each company on its respective line. It was held that Hull was not a servant of the Philadelphia & Reading Company, by which he was killed, but only the servant of the Western Maryland Company. That was because the work which Hull was doing was the work of the Western Maryland Company, even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Company. The locomotive belonged to the Western Maryland Company, the cars belonged to the Western Maryland Company and the loads that were carried were being carried for the Western Maryland Company, and presumably the rates which were received for the transportation were the receipts of the Western Maryland Company. In other words, the whole line between Hagerstown and Rutherford was exactly as if it had been jointly owned by the two companies, and jointly used by them for their freight trains. Therefore the work was done by the Western Maryland for itself

and the mere transfer of the train owned by the Western Maryland and operated by it on to the rails of the Philadelphia & Reading Railway did not transfer the relation of the deceased from the general employment of the Western Maryland to a special employment by the Philadelphia and Reading as another master.

In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the deceased was the line of the Chesapeake & Ohio, which was master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio.

For these reasons, the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court of Kentucky restored.

A true copy.

Test:

Clerk, Supreme Court, U. S.